EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 344.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

OZRO CASTLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

RECORD FILED JULY 5, 1910.

(22,252)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 4, 1912.

* * * * * * *

(Record, Page 2.)

Be it remembered, That on the 5th day of June, 1908, Petition was
ed in the Clerk's office of the Circuit Court, which said Petition is
words and figures following, to-wit:

the Circuit Court of the United States for the District of Nebraska, Omaha Division.

OZRO CASTLE, Plaintiff,
vs.
MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Petition.

For cause of action against defendant, plaintiff alleges:
1. This is an action of a civil nature wholly between citizens of
fferent states and the matter and amount in controversy, exclusive
interests and costs, exceeds the sum of $2000.00.
2. Plaintiff is a resident and citizen of the State of Nebraska re-
ling at Omaha in said state.
3. The defendant is a corporation organized and existing under
d by virtue of the laws of the State of Missouri and is a citizen of
d State of Missouri.
4. The defendant Company is engaged in the owning and operat-
g of a steam railway through the States of Missouri, Nebraska
d elsewhere and at all times hereinafter mentioned the defendant
mpany was so engaged.
5. At the time of the infliction of the injuries hereinafter de-
ibed plaintiff was in the employ of the defendant Company as a
akeman.
6. On the 2nd day of October, 1907, between eleven and twelve
lock A. M., the plaintiff, while in the proper discharge of his
ties as a brakeman in the employ of the defendant Company was
isting in the operation and conduct of train number 163 consist-
g of eighteen or nineteen cars in the Company's yards at Auburn,
braska. The crew on said freight train consisted of the conductor,
ad and rear brakeman and an engineer and fireman. The plain-
' was the head brakeman. The train had just come into Auburn
m St. Joe, Missouri, and having passed along the main line to
north of the station, was backed on to the house track which is
st of and connected with the said main line. Said house track
ld not accommodate all of the cars and the plaintiff cut the train
t back of the fifth car from the engine, and stepping on said fifth
, signalled to the engineer "go ahead." When the car on which

he was riding passed from the house track on to the main line pla
tiff swung to the ground and signalled the engineer to stop and s
engine and five cars were stopped within a few feet from where
house track switches into the main line track. The plaintiff th
crossed to the west of the main line where the switch connecting
house track with said main line stands and threw the same, then
disconnecting the house track and leaving the main line open.
then started to cross again to the east side of the main line to sig
the engineer to go on north when suddenly, without signal by
or whistle or otherwise, and without warning of any character wh
soever, and without direction to move, and with full knowledge
plaintiff's presence in the immediate rear of said engine and
cars, the defendant Company, through its agents and servants c
lessly and negligently started said engine and five cars south al
said main line catching plaintiff just as he was crossing east on s
main line, throwing him to the ground, and so crushing his ri
leg about four inches above the ankle that same hung only
threads of flesh and had to be immediately amputated.

7. The defendant Company in so running down and crush
plaintiff without warning of any character, was negligent in the
lowing particulars:

In failing to sound a whistle or bell or give other sign or signa
the purpose and intention to move said engine and five cars; in n
ing said engine and five cars with full knowledge of the presence
the plaintiff in the immediate rear thereof, without first ascertain
his exact location or so warning him of the intention to move s
train as to give him an opportunity to protect himself; and in n
ing said engine and five cars without signal from the plaintiff, w
full knowledge that the plaintiff relied upon said engine and
cars not being moved in any direction without signal from him.

8. Immediately prior to receiving the aforedescribed injuries,
of which were inflicted through the defendant's negligence,
without any fault or negligence whatsoever on plaintiff's part,
plaintiff was a young man of robust health and 24 years of
capable of earning and in fact earning a remunerative income
his daily labor. Since receiving said injuries, and by reason ther
plaintiff has been rendered a cripple for life and unfit and incapa
of performing a vocation in which he can earn a livelihood.

9. By reason of the afore described injuries inflicted through
defendant's negligence, plaintiff has suffered and still suffers, and
will continue throughout the period of his natural life to suffer g
bodily pain and mental anguish; has been put to great expense
medical and surgical care and attendance and nursing and m
cines, and has been damaged by and through the infliction of s
injuries, in the sum of $30,000.00.

Wherefore, plaintiff prays judgment against the defendant
the sum of $30,000.00 and the costs of this action.

OZRO CASTLE.
By His Att'ys T. J. MAHONEY AN
J. A. C. KENNEDY.

STATE OF NEBRASKA,
County of Douglas, ss:

Ozro Castle, being first duly sworn deposes and says that he is plaintiff in the above entitled action; that he has read the above and foregoing petition and the facts therein stated are true, as he verily believes.

OZRO CASTLE.

Subscribed in my presence and sworn to before me this 22 day of May, 1908.

J. A. C. KENNEDY,
[SEAL.] *Notary Public.*

Endorsed: Filed Jun- 5, 1908, Geo. H. Thummel, Clerk.

(Record, Page 6.)

Thereupon afterwards, to-wit:—On the 12th day of October 1908, Answer was filed in said case, which said Answer is in words and figures following, to-wit:—

In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

OZRO CASTLE, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Answer.

For its answer to plaintiff's petition, defendant says:

That it admits that it is now and at all of the times mentioned in said petition was a railway corporation organized and existing under and by virtue of the laws of the State of Missouri and engaged in the transportation of passengers and freight and in commerce between the states and thereon alleges that as such common carrier of passengers and freight, this answering defendant owns and operates and at all of said time- did so own and operate a regular standard gauge railroad into and through the states of Missouri, Kansas, Colorado and Nebraska, operating its trains between the cities of St. Joseph and St. Louis, Mo., and Omaha and South Omaha and into and through the city of Auburn, Neb., but denies each and every other statement, averment and allegation in said petition contained, except such as are hereinafter specially admitted and confessed.

Second.

Further answering this defendant says that if the plaintiff was injured at the time and in the manner set forth in his said petition that the negligence, if any, causing such injury was that of a fellow servant or co-employee of the plaintiff for which the defendant company is not and could not be held liable.

Third.

Further answering this defendant says that if the plaintiff was injured in the manner as alleged and set forth in his said petition, that said plaintiff received his said injuries through his own fault and negligence and through his failure to exercise reasonable and ordinary care for his own protection, and not through any fault or neglect or omission on the part of this defendant.

Fourth.

Further answering this defendant says that if the plaintiff claims the right to recover under and by virtue of Chapter 48 of the session laws of the Legislature of Nebraska for the year 1907, entitled "An act imposing liability upon railway companies in favor of employees on account of injuries resulting from the negligence of fellow servants," etc. a copy of which said act is hereto attached and made a part hereof, then this answering defendant alleges and says that said Chapter 48 is violative, repugnant to and in contravention of Section 1 of the Fourteenth article of amendments to the Constitution of the United States which provides:

"SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

In that

Section 2 of said Chapter 48 of the session laws of Nebraska of 1907, provides amongst other things:

"That in all actions hereafter brought against any railway company to recover damages for personal injuries to an employee, or when such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight and that of his employer was gross in comparison," etc.

thereby depriving the defendant company in this action of the defense of contributory negligence accorded to all other litigants, persons or corporations within the state of Nebraska, and violating that part of Section 1 of the Fourteenth Article of Amendments to the constitution, which provides:

"No state shall make or enforce any law * * * which shall abridge the privileges or immunities of citizens of the United States; * * * nor deny to any person within its jurisdiction the equal protection of the laws."

Also in that

Said Section 2 of said Chapter 48 of the said session laws of Nebraska of 1907 further provides:

"All questions of negligence and contributory negligence shall be for the jury,"

thereby further depriving the defendant company, being within the jurisdiction of the State of Nebraska of the equal protection of the laws and abridging its privileges and immunities as a citizen of the United States within such jurisdiction.

Also in that

Said Section 2 of Chapter 48 of the session laws of 1907 which further provides:

"But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

thereby establishing and seeking to enforce against the defendant company a rule of damages, not applicable to any other litigant in similar cases and thereby violative of Section 1 of Article Fourteen of amendments to the Constitution of the United States by denying the defendant company the equal protection of the laws and also by abridging the privileges and immunities of this defendant, being a citizen of the United States within the jurisdiction of said state of Nebraska.

Fifth.

Further answering this defendant says that said Chapter 48 of the session laws of Nebraska of 1907 in so far as it affects the defendant in this case is unconstitutional and void and violative and in contravention of and repugnant to that part of Section 10 of Article 1 of the Constitution of the United States which provides:

"That Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes,"

and is in conflict with and repugnant to the acts of Congress entitled "An Act to regulate commerce," approved Feb. 4, 1887, and of the acts of Congress amendatory thereof and supplemental thereto, adopted June 9, 1906, which gives to the Congress of the United States the sole and exclusive power to legislate upon, govern and control any corporation and every common carrier engaged in commerce in the District of Columbia or in any territory of the United States or between the several states, etc.

In that

As alleged in the petition in this cause, the plaintiff at the time he received the injury complained of was engaged as an employee of an interstate railroad engaged in commerce between the states of Missouri, Kansas and Nebraska, and said Chapter 48 of the session laws of Nebraska of 1907, attempts to regulate and control as well as create a cause of action and remedy, imposing upon the defendant company a liability inconsistent with and repugnant to the action of Congress of the United States on said subject.

Wherefore this defendant prays to be dismissed herefrom with its costs of suit.

JAMES W. ORR,
B. P. WAGGENER,
Attorneys for Defendant.

STATE OF KANSAS,
Atchison County, ss:

James W. Orr, of lawful age, being first duly sworn on his oath deposes and says that he is now and for many years last past has been one of the duly authorized attorneys for the above named defendant, The Missouri Pacific Railway Company, which said company is a foreign corporation; that he has read the contents of the above and foregoing answer and that the statements, averments, allegations and denials therein contained are true as he is informed and verily believes.

JAMES W. ORR.

Subscribed and sworn to before me this 10th day of October, 1908.
[SEAL.] H. W. BRENT,
Notary Public.

My Commission expires May 4, 1911.

Chapter 48.

(Senate File No. 5.)

(Introduced by Mr. Gibson.)

An act imposing liability upon railway companies in favor of employés on account of injury resulting from the negligence of fellow-servants, or the negligence of employés of such railway company, or on account of defective appliances, tracks, roadbed or works; prescribing rules relating to contributory negligence under this act; providing that no contract of employment, insurance or indemnity hereafter made nor any relief benefit paid thereunder shall be a defense against recovery under this act, and reserving to such railway company the right to set off any relief benefit, insurance or benefit paid to the plaintiff:

Be it enacted by the legislature of the State of Nebraska:

SECTION 1 (Railway Company's liability to injured employé). That every railway company operating a railway engine, car or train in the State of Nebraska shall be liable to any of its employés who at the time of injury are engaged in construction or repair work, or in the use and operation of any engine, car or train for said company, or, in the case of his death, to his personal representatives for the benefit of his widow and children, if any, if none, then to his parents, if none, then to his next of kin dependent upon him, for all damages which may result from negligence of any of its officers, agents or employés, or by reason of any defects or insufficiency in its cars, engines, appliances, machinery, track, road-bed, ways or works.

SECTION 2 (Same; contributory negligence). That in all actions hereafter brought against any railway company to recover damages for personal injuries to an employé, or when such injuries have resulted in his death, the fact that the employé may have been guilty

of contributory negligence shall not bar a recovery when his contributory negligence was slight and that of the employer was gross in comparison, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé, all questions of negligence and contributory negligence shall be for the jury.

SEC. 3 (Same: indemnity insurance). That no contract of employment, insurance, relief benefit, or indemnity for injury or death hereafter entered into by or on behalf of any employee nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employé; Provided, However, That upon the trial of such action against any railway company the defendant may set-off any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employé, or, in case of his death, to his personal representative.

Approved March 11, 1905.

Endorsed: Filed Oct. 12, 1908. Geo. H. Thummel, Clerk.

* * * * * * *

(Record, Page 14.)

Thereupon afterwards, to-wit: On the 22nd day of October, 1908, reply was filed in said case, which said Reply is in words and figures following, to-wit:—

In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

"Y," 102.

OZRO CASTLE, Plaintiff,
vs.
MISSOURI PACIFIC RAILROAD COMPANY, Defendant.

Reply.

For reply to defendant's answer plaintiff alleges:

Plaintiff denies each and singular the averments contained in defendant's answer.

OZRO CASTLE,
By His Att'ys, MAHONEY & KENNEDY.

STATE OF NEBRASKA,
County of Douglas, ss:

Ozro Castle being first duly sworn on oath deposes and says that he is the plaintiff in the above entitled case; that he has read the above and foregoing Reply and the facts therein stated are true as he verily believes.

OZRO CASTLE.

Subscribed and sworn to before me this 21 day of October, 1908.

[SEAL.] J. A. C. KENNEDY,
Notary Public.

Endorsed: Filed Oct. 22, 1908. Geo. H. Thummel, Clerk, By John Nicholson, Deputy.

(Record, Page 15.)

Thereupon afterwards, to-wit:—At the April 1910 Term of said Court and on the 14th day of April, 1910, the following proceedings were had and done in said case, as appear of record in Journal No. "8" of said Court, to-wit:

102, Y.

OZRO CASTLE
vs.
MISSOURI PACIFIC RAILWAY COMPANY.

This cause coming on for trial, plaintiff appeared by Mahoney & Kennedy, his Attorneys, and the defendant appeared by James W. Orr, its Attorney; also came the following named persons as jurors to-wit:

Gilbert Olson,	John Holling,	John H. Glassman,
Charles O. Talmage,	Simon E. Mills,	William Paul,
O. Johnson,	Henry Bolton,	Charles J. Emory,
William Schafersman,	August Joost,	Otto Davis,

who were duly empanelled and sworn to try the issues joined herein, and thereupon the trial proceeded. And the said jury having heard the opening statements of counsel and the testimony of the plaintiff adduced in part, and the trial of said cause not being concluded at the hour of adjournment, it is

Ordered That further proceedings herein be and they hereby are postponed until tomorrow morning at 9:30 o'clock.

* * * * * * *

(Record, Page 18.)

Thereupon afterwards, to-wit:—At the April 1910 Term of said Court, and on the 16th day of April, 1910 the following proceedings were had and done in said case, as appear of record in Journal No. "8" of said Court, to-wit:

102, Y.

OZRO CASTLE
vs.
MISSOURI PACIFIC RY. CO.

This day again came the parties herein by their attorneys, and also came the jury heretofore empanelled and sworn and the trial proceeded. And the said jury having heard the remaining testimony, the argument of counsel and the instructions of the Court, retired to their room in charge of a bailiff duly sworn, to deliberate on their verdict. And now come said jury into open Court with their verdict in words and figures following, to-wit:

"United States Circuit Court, District of Nebraska, Omaha Division.

No. 102, Doc. Y.

OZRO CASTLE, Plaintiff,
against
MISSOURI PACIFIC RY. CO., Defendant.

Verdict.

We, the Jury in the above entitled cause, find in favor of the plaintiff therein, and assess his damages at the sum of Ten Thousand Dollars ($10,000.00).

Dated this 16th day of April, 1910.

C. J. EMERY, *Foreman.*"

It is therefore:

Considered, ordered and adjudged that the above named plaintiff, Ozro Castle, do have and recover of and from the defendant, Missouri Pacific Railway Company, the sum of Ten Thousand Dollars ($10,000.00), and the costs of this action, and that he do have execution therefor.

* * * * * * *

(Record, Page 281.)

Upon the conclusion of argument of counsel to the jury, the defendant requested the court to give the jury each and all of the several instructions and charges following, that is to say:

Instruction No. 1 Requested by Defendant.

"The jury are instructed that the plaintiff has failed to make out or prove any cause of action in his favor against the defendant company and you will therefore find a general verdict in favor of the defendant Company."

But the court refused said request, to which refusal defendant then and there duly excepted.

Instruction No. 2 Requested by Defendant.

"The jury are instructed that there is no allegation in the petition in this case charging the defendant company or any of its officers, servants, or agents with gross negligence and there has been no evidence introduced proving or tending to prove that the defendant company or any of its agents or servants in charge of the engine attached to a portion of train No. 163 at the time the plaintiff sustained the injuries complained of, were guilty of any acts of gross negligence, proximately causing the injuries complained of, hence the doctrine of comparative negligence in the statute law of Nebraska does not apply to this case. And, if you find from the evidence that the plaintiff was guilty of contributory negligence, as in these instructions defined, contributing and proximately causing the injury complained of, then your verdict must be for the defendant."

But the court refused said request, to which refusal defendant then and there duly excepted.

Instruction No. 3 Requested by the Defendant.

"The jury are instructed that under the law the conductor, the engineer and the brakeman of a freight train, while engaged in moving and operating such train are what is known in the law as fellow servants and if either or any of such persons is injured while so engaged through the fault, neglect, carelessness or negligence of any one of the other of such persons, then the employer—in this case the defendant railroad company—could not be held liable for any damage which such person might sustain on account of, such injuries. The law is that the master or employer cannot be held liable for any injury sustained resulting from the negligence of a co-employee or fellow servant, and you are thereon instructed that if you find from the evidence that the plaintiff was injured through the fault, neglect, omission or negligence of the engineer or the conductor in charge of and moving trains Nos. 163 or a portion thereof, then the plaintiff would be held to have sustained such injuries through the negligence of a fellow servant for which the defendant company could not be held liable and your verdict must be for the defendant."

But the court refused said request, to which refusal defendant then and there duly excepted.

Instruction No. 4 Requested by the Defendant.

"The jury are instructed that it appears from the allegations of the petition and by the undisputed evidence in this case, that at the time the plaintiff sustained the injuries complained of he was in the service and the employ of the defendant company, an interstate carrier, upon a freight train of said defendant which said train was at the time engaged in trade and commerce between the states of Missouri, Kansas and Nebraska. And the defendant railroad com-

pany, being such interstate carrier, and the plaintiff, while so engaged, were each and both, so far as any liability on the part of the defendant or right to recover for injuries sustained on the part of the plaintiff, were each and both governed solely by the constitution and laws of the United States and if you find from the evidence in this case that the plaintiff was injured through the negligence of either the engineer or conductor or both, while the plaintiff and said engineer and conductor were engaged in handling or moving said freight train so engaged in commerce between the states, or if you should find that the plaintiff, by his own failure to exercise reasonable and ordinary care, proximately contributed to cause the injury complained of then or in either of such events, the defendant company could not be held liable in damages and your verdict must be for the defendant."

But the Court refused said request, to which refusal defendant then and there duly excepted.

* * * * * * *

Instruction No. 10 Requested by the Defendant.

"The jury are instructed that the testimony of a witness who is in position to hear and testifies that he did hear the bell ring is entitled to more weight than the testimony of a witness who says that he did not hear the ringing of the bell."

But the court refused said request, to which refusal defendant then and there duly excepted.

* * * * * * *

(Record, Page 288.)

The charge of the court upon its own motion, as a whole to the jury, was as follows:

GENTLEMEN OF THE JURY: This action is brought by the plaintiff, Mr. Castle, against the Missouri Pacific Railway Company to recover damages which he alleges he sustained by reason of the negligence of the defendant company. That he was in the employ of the defendant company as a brakeman in October, 1907, at the time of the injury in question, is not controverted. That he sustained an injury to his foot by reason of the train, or cars, on the Missouri Pacific Railway Company tracks in the yards at Auburn, Nebraska, is not controverted.

One of the real questions in the case is, how did the accident happen. On the part of the plaintiff it is claimed that in the performance of his duty he had gone to the west side of what is called the house track for the purpose of turning the switch, that the train had moved up, the engine and five cars, or whatever the number was,—I think it was five; you are to be governed by your own remembrance; the evidence, I haven't anything to say about it; I only mention it to illustrate the facts,—the engine and five cars had pulled up, and he went across to the west side and turned the

switch so they could return back down to the south on the main track; that, after he had turned the switch and while he was passing across the track to the east side so as to signal the engineer to back up, the engineer, without any warning, started the train back, which struck him, and that in his efforts to escape from the contact his foot was thrown under, or caught under the wheel and run over, resulting in the injury and in the amputation as has been testified to.

Now, on the part of the defendant it is claimed that it did not happen in any such way. It is claimed that he, after he had thrown the switch on the west side, came across the track without the cars moving, that he gave a signal for them to back up, as the engineer says, a signal to go forward and then a signal to stop and back, and that the engine and cars did not start back until after he had come clear across the track and gave the signal, and that he then went toward the car and in some manner then his foot was caught and injured.

Now, there are two different theories, each supported by some evidence as to how the injury occurred. In the natural order of your pursuing your inquiry, it would be natural for you to first ascertain how this injury happened.

The plaintiff is not entitled to recover simply because there was an accident, simply because he sustained an injury. He can only recover upon the theory that the injury was caused by the negligent conduct of the defendant, acting through some employé. In his petition he alleges that the act of negligence consisted in backing the train without giving any warning by the ringing of the bell, or sounding of the whistle, and with knowledge that he would be in the rear of the train, and without waiting for any signal, but the signal for the train to move was a signal which should be given by the plaintiff to the engineer, and plaintiff relying upon the fact that the train would not move without a signal from him, he passed across the track in the rear of the cars.

Now, as I say, it is a question of fact for you to determine from the evidence how it happened. Of course, if it did not happen in the manner in which the plaintiff says, if he did come back after turning the switch to the eastward, across the track to the east side of the train, gave a signal for the engineer to back up and the engineer backed upon the signal of the plaintiff, and then the plaintiff went forward towards the cars and in some way his foot was caught, it would be without fault on the part of the engineer, and I may say here that if the railroad company's employees were negligent in this respect it was the negligence of the engineer. They don't claim that the doctor or any other employee were negligent. In the movement of the train if anybody was negligent it was the engineer. Now, I say, if you do find that he did come across after turning the switch and signaled the engineer to back up, the engineer, of course, would have a right to do his duty and obey the signal and back up, and then the plaintiff went forward while the train was moving attempting to catch hold, or in some way the accident happened, then he could not recover because it would be no fault of the engineer.

On the other hand, if after he had turned the switch on the west side he started to come across the track in the rear of the cars to signal the engineer to move backward, and the train was moved upon signals by the plaintiff, and the engineer backed the engine and cars without any signal from the plaintiff and without giving warning by ringing the bell, or blowing the whistle, the plaintiff would have a perfect right to assume that the train would not be moved backward without a signal from him, or at least without a warning by ringing the bell or blowing the whistle; and if it did move bickward, as I say, without receiving any signal, the engineer did without receiving any signal from the plaintiff, without ringing the bell, or blowing the whistle, and he was struck and received the injury in the manner in which plaintiff testifies, then the plaintiff would be entitled to recover, provided you find that the engineer was guilty of negligence in so moving the train and that the plaintiff himself was not guilty of contributory negligence.

So there is a question of fact for you to determine from the evidence as to how the injury occurred in the first place. If you find, as I say, that it occurred in the manner as testified to by the defendant's engineer, and as claimed by the defendant, then the plaintiff would not be entitled to recover. If you find, however, that it occurred in the manner as stated by the plaintiff, then your next inquiry would be, was the engineer in moving the train backward, guilty of negligence, and was the plaintiff himself in passing across the track, in the rear of the car without noticing to see particularly whether they were moving, was he guilty of contributory negligence and then what was the comparative degree of negligence of the engineer and of the plaintiff. The rule of common law was that a party could not recover for an injury which was caused by his own contributory negligence, but the legislature of this state have passed a statute relating to railroad companies. So far as railroad company employees are concerned, it modifies that rule, so much of the statute as is applicable to this case, reads as follows:

"That every railway company operating a railway engine, car or train, in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in the operation of any engine, car, or train for said company, for all damages which may result from negligence of any of its officers, agents or employees.

So that you must find in the first place whether or not the engineer in the employ of the defendant company was guilty of negligence in moving the train back, guilty of negligence as alleged in the petition. Then with regard to contributory negligence, the statute is as follows:

"That in all cases hereafter brought against any railway company to recover damages for personal injuries to any employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight, and that of the employer was gross in comparison, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

So then, as I say, to entitle the plaintiff to recover, the evidence must satisfy you that the injury was caused by the negligence of the engineer in the movement of this train, or these five cars. Then your next inquiry should be, was the plaintiff himself guilty of contributory negligence. If he was not, then the question of contributory negligence is out of the case. If he was guilty of contributory negligence then you are to make a comparison of the negligence of the engineer and the negligence of the plaintiff and determine whether or not the negligence of the engineer was gross as compared with the negligence of the plaintiff. And then from the amount of damages you are to deduct or diminish them in proportion as you estimate or find the amount of negligence attributable to the plaintiff.

If you find for the plaintiff you will assess such damages as the evidence satisfies you he has sustained, and based upon two elements. The testimony is undisputed that he has lost his foot. His foot has been amputated so that there is at least a permanent injury in the loss of his foot. To what extent does the loss of the foot reduce his earning capacity, if any, and considering his position *of* life, how much does that reduce his earning capacity. Now, that is one element of damage. The Carlisle tables of life expectancy have been introduced in evidence for the purpose of giving you some indication as to the probable duration of life of a person at his age. You are not bound to accept the Carlisle tables as absolute and accurate, but they are proper evidence and should be considered by the jury in determining the probable duration of life. As I say, they are not absolute, because we all know that a person of twenty four years of age may be perfectly healthy today and in a month's time be dead from disease, while on the other hand, the tables of expectancy might fix a period of life at 38 years, or 40 years, and some people live a much longer period than that. So they are not absolute but they are based upon what years of experience have shown to be the average duration of life, and for that reason are accepted by the courts as competent evidence to be considered in estimating or determining the probable duration of life, and they should receive consideration at your hands in that respect, although they do not indicate absolute- just how long a person will live.

Now, in addition to the loss of his earning capacity which results from the loss of his foot, he is entitled to damages for the pain and suffering which he has sustained by reason of the injury, resulting as the direct result of the injury, or which he may sustain in the future as the direct result of the injury. If you find that it is of a character which will produce or cause pain in the future, and when I say pain, or pain and suffering resulting from that, I mean all that results to him from the injury, whatever the pain which results from the injury. He is not entitled to any compensation for mental suffering which he might sustain by reason of feeling humiliated in going around in society because of his disfigurement; that is not the pain a person is entitled to recover for. It isn't because he may feel somewhat proud and feel humiliated because of the loss of his foot and wearing an artificial foot, and think people might look down

upon him with a little disfavor or something of that kind—it is not the pain resulting from that, but it is the physical and mental pain which is the result of the injury, and there is no method by which the law can determine mathematically how much a person shall have for pain and suffering,—no way to estimate that. Pain and suffering might vary of course, because of their general physical health and so forth, so the law leaves that to the judgment of the jury to determine what would compensate a person for the pain and suffering he would sustain by reason of the injury, having his foot crushed and having his foot amputated,—what would compensate him for the suffering he has endured and which, from the evidence, you are satisfied he will sustain, if you find he will sustain pain and suffering in the future as the direct result of that injury. All to be considered in determining the damages. So the damages are the result of the sum of those two elements: What has he lost by reason of his diminished earning capacity and what will compensate him for the pain and suffering which he has sustained by reason of that injury, resulting from the injury, and which he will sustain in the future as the direct result of that injury, if any. Those two elements constitute the damage which he is entitled to if you find that he is entitled to recover in this case at all.

I have been asked to give some instructions by both parties, some of which I give and some I do not. On the part of the plaintiff you are instructed that: (Reading plaintiff's instruction No. 1)

"In determining whether the plaintiff, Castle, was guilty of negligence contributing to his injury, you will bear in mind that due care on the part of a servant does not require him to anticipate negligence on the part of his master. In other words, in deciding what degree of care Castle ought to have used in returning from the switch to the east side of the main line track, you are instructed that if, under the conditions then existing, the engines and cars standing to his north could not move backward except by the negligence of the defendant company, he would not be obliged to anticipate that they were about to so move, and in that event an omission on his part to do something that would be prompted only by anticipating that the defendant would negligently cause such cars to move backward against him would not be contributory negligence on his part.

(Reading instruction No. 2 requested by the plaintiff, modified by the Court:)

"If you find for the plaintiff there are two principal elements of damage for which you will allow him compensation. One is the loss or diminution of earning capacity; the other is pain and suffering.

On the element of loss of earning capacity you will consider the probable length of the plaintiff's life, the amount that he was able to earn at and immediately before his injury; the probable periods when he might earn so much and the chances when he might earn more. All these are proper suggestions to enable you to determine what his probable future earning capacity would be. You will also take into account the extent of his disabilities, and the extent to which, if at all, his earning capacity has been reduced by reason of

his injury. With this data and these suggestions you should fix his damages at a sum which would, when prudently invested, and applied, furnish him what would amount to the amount of his loss in earning capacity for the laboring years of his life, and in this way compensate him for his diminished earning capacity."

Then I want to explain that it wouldn't be proper to say that a party would probably have earned so much a year, illustrative, $500.00 a year, or that his loss in his earning capacity would be say, $500.00 a year, and that the sum of $10,000 would produce an income of $500.00 a year, so that he would have during each year that he lived a sum which would equal what he had lost in earning capacity, and then have the principal sum left to grant his estate. It should be on the theory that he will live, say 30 or 40 years, and that at the end of that time he should have received just what would compensate him for the diminished earning capacity, and the whole thing be exhausted at that time. In other words the law won't permit you to give him the sum which put at interest would produce annually in interest the amount which he has lost by reason of the diminishing of his earning capacity, and then leave the principal of that sum to his heirs subsequently. The theory is that he should be compensated during his lifetime for what he has lost in his earning capacity and you can figure that out so that the principal would be exhausted also at the time of his death.

"On the element of pain and suffering the law does not afford any exact or mathematical rule by which that item can be determined. You should take into account the nature and character of the injury, the length of time plaintiff was required to remain in the hospital, the fact that because of the injury the amputation of his foot became necessary, his present condition and the probabilities of pain resulting from the kind of an injury disclosed, and you should allow him, upon this branch of the case, if you find in his favor, such an amount as would fairly and reasonably compensate him for the pain and suffering endured to the present time, and for such pain and suffering as the evidence shows to a reasonable certainty he will continue to endure in the future on account of this injury."

(Reading instruction No. 3 requested by plaintiff.)

"If you find in the plaintiff's favor the amount of your verdict will be the aggregate of what you find due him, under the court's instructions for both loss of earning capacity, either in whole or in part, and his pain and suffering, as disclosed by the evidence."

On the part of the defendant you are instructed that:

(Reading instruction No. 5 requested by defendant.)

"The jury are instructed that in no event can the defendant company be held liable for a purely accidental injury and in this case if you find from the evidence that the plaintiff was attempting to ride on one of defendant's freight cars by placing his foot upon the brakebeam thereof, while the car was in motion, his foot slipped off the brakebeam upon one of the rails of defendant's track and a wheel of said car passed over his foot, then the defendant company would not be liable for the injury so sustained and your verdict must be for the defendant."

(Reading instruction No. 7 requested by the defendant.)

"The jury are instructed that if they find from the evidence that the plaintiff after having given a signal to those in charge of defendant's train, to move the same, stepped towards a moving car intending to place his foot upon the brakebeam or some other portion of defendant's car for the purpose of riding thereon, and carelessly placed his foot upon the rail of the track instead, immediately in front of a moving wheel and the plaintiff was thereby injured by the wheel passing over his foot, then the plaintiff cannot recover herein and your verdict must be for the defendant."

(Reading instruction No. 8 requested by the defendant.)

"The jury are instructed that the plaintiff can only recover, if at all, upon some one *of* all of the grounds of negligence alleged in the petition and the negligence proved if any, must have been the proximate cause of the injury complained of. The negligence charged in the petition is that the defendant company or those in charge of its engine, and cars, at the time, failed to sound a whistle or bell, or give other sign or signal of the purpose and intention to move said engine and five cars; in moving said engine and five cars with full knowledge of the presence of the plaintiff in the immediate rear thereof, without first ascertaining his exact location or so warning him of the intention to move said train as to give him an opportunity to protect himself, and in moving said engine and five cars without signal from the plaintiff, with full knowledge that the plaintiff relied upon said engine and five cars not being moved in any direction without signal from him."

That is what he alleges in his petition as negligent conduct of the defendant, and he can only recover upon showing that the defendant was negligent in some one of those in the respect that it is alleged. It isn't necessary for him to show that they were negligent in all these respects, but he must show that the injury resulted from the negligence of the defendant in some one of those respects.

"The burden of proving one or more of these allegations of negligence by a preponderance of the evidence rests upon the plaintiff and the negligence proved if any, must have been the proximate cause of the injury complained of and unless you so find your verdict must be for the defendant."

The burden is upon the plaintiff to show his case by a preponderance of the evidence. By a preponderance is not meant the greatest number of witnesses. In determining which side has the preponderance of the evidence, you do not count up and say there were three witnesses on one side and two on the other, and therefore the preponderance is with the greatest number of witnesses, the side that has the most, but the preponderance of the evidence is that evidence which is the most convincing to your mind, the most satisfying and convincing to your mind. If there was only one witness that might be more convincing than the testimony of two witnesses testifying to the contrary fact and the testimony of the one is more convincing to your mind as regards truthfulness, then the preponderance of the evidence would be according to the evidence of the one.

(Reading instruction No. 9 requested by the defendant.)

"The jury are instructed that one who accepts service or employment with a railroad company thereby contracts and agrees that he knows and understands the duties and usual hazards of such employment and assumes the ordinary risks and dangers incident thereto and in this case, if you find from the evidence that the injury sustained by plaintiff resulted from the ordinary risks and hazards of the business in which he was engaged and such as he assumed when entering upon the discharge of the duties thereof, then he cannot recover herein and your verdict must be for the defendant."

The rule is as stated, that a party assumes those risks that are ordinary risks, dangers that are ordinary dangers of the employment, because in the railroad employment, or any machinery, there is more or less danger where nobody is at fault particularly. But risks are extraordinary that a party cannot be expected to anticipate or foresee. He cannot anticipate and foresee that others, employees or agents, will be guilty of any negligence and that he will be injured, excepting ordinary risks which may be said to be ordinary risks of the business.

(Reading instruction No. 11 requested by the defendant.)

"The jury are instructed that positive, affirmative testimony is always to be preferred to negative testimony where the opportunity of observation of the witnesses testifying are the same."

I think that is all I want to say to you excepting to say further that you are the sole judges of the credibility and weight which is to be given to the testimony of the witnesses. In ascertaining the credibility of the several witnesses, and the amount of weight which you will give to their testimony, consider their demeanor upon the witness stand, the reasonableness or unreasonableness of their statements, the interest or lack of interest, if any, which they may have in the result of the suit; these are all matters for you to consider in determining the amount of weight or credibility which you will give to any one or more of the witnesses.

I think that is all I have to say to you to enable you to properly discharge your duties.

A formal verdict will be furnished you, one finding generally for the defendant, and if you find for the defendant have your foreman sign that one; and one finding for the plaintiff and leaving the amount blank. If you find for the plaintiff write in there the amount that you find he is entitled to recover and receive, and then have your foreman sign that one.

Record, Page 31.)

Mr. MAHONEY: The first exception that we wish to reserve is to that part of the court's charge relating to whether or not the defendant was guilty of negligence by backing the train without warning by bell or whistle, that being coupled with the other statement, backing without a signal from the plaintiff. There is no exception to the part referring to the backing without a signal from

the plaintiff but the expression "without warning by bell or whistle" is alone excepted to at that point.

Second. We wish to reserve an exception to that portion of the charge relating to whether or not the plaintiff may have been guilty of contributory negligence and assuming that the injury happened while he was returning from the west to the east side of the track, wherein the court said that the jury would consider whether or not the plaintiff was guilty of contributory negligence in crossing back from the switch without noticing particularly whether the train was moving.

Third. We reserve an exception to that part of the charge wherein the court said to the jury in substance that one inquiry is whether plaintiff was guilty of contributory negligence in returning across the track after throwing the switch, and I may say to the court that the point on which we make that exception is that in our view of the case, this is a case in which, if the injury happened while Castle was returning from the west side to the east, under the evidence in this case the question of contributory negligence should have been withdrawn from the jury entirely and the jury informed, if it happened in that way, he was not guilty of contributory negligence. That is the theory on which we reserve that exception, and I wish to say in that connection that I am unable to repeat a portion of the charge. We except severally to each part of the charge that submits to the jury any question of contributory negligence in connection with the theory that they may find that he was injured while returning from the west side of the track.

At the time the said instructions were given, and in the presence of the court and jury, the defendant excepted specially to the giving of the following instruction by the court:

The defendant excepts to the statement made by the court to the jury as to the law of the case describing what would constitute negligence in that certain acts described by the court to the jury and collected together would constitute negligence, that is to say, if the defendant moved its train without a signal from the plaintiff it would be negligence on its part.

Also, and in the presence of the jury and court, the defendant excepts to that part of the instructions of the court in which the court instructs the jury that if the plaintiff was guilty of negligence contributing to, or causing his injury, that would not bar a recovery if the negligence of the plaintiff was slight in comparison with the gross negligence of the defendant, there being no allegation of gross negligence in the petition, and no showing of that kind.

And further, and in the presence of the jury and court, the defendant excepts to that part of the instructions of the court which says that if the jury should find that both the plaintiff and defendant were guilty of negligence combining or contributing to the injury of the plaintiff, then the plaintiff would still be entitled to recover, but would be entitled only to a diminution of damage which was to be ascertained by the jury in comparing the one with the other.

And further, and in the presence of the jury and court, the defendant excepts to that part of the instructions of the court which refers to the Carlisle tables of expectancy, and directs the jury to consider the same in arriving at their verdict, if they find for the plaintiff, because the Carlisle tables of expectancy or other tables of life expectancy are not proper subjects of testimony or evidence, or properly to be considered by the jury in arriving at their verdict in an action where the injury has not resulted in death.

And further, and in the presence of the jury and court, the defendant excepts to that part of the instructions of the court which states to the jury the measure of damage, in that it allows to the jury the right to compare the negligence of the plaintiff with the defendant and establishes a measure of damage unauthorized by law, and not applicable generally to actions at law.

And further, and in the presence of the court and jury, the defendants objects and excepts to each instruction given by the court to the jury except such as were given at the request of the defendant for the reason that the entire instruction does not when stated together state the law of the case.

(Record, Page 304.)

It is hereby stipulated and agreed by and between Ozro Castle, Plaintiff herein, by his counsel, and Missouri Pacific Railway Company, Defendant herein, by its counsel, that the foregoing Bill of Exceptions contains all of the evidence given or offered on the trial of the case of Ozro Castle, Plaintiff vs. Missouri Pacific Railway Company, Defendant, tried in the Circuit Court of the United States for the District of Nebraska, at Omaha, Nebraska, and correctly shows the proceedings had on said trial; and that said Bill of Exceptions is correct in all respects, and that the same may be signed, settled, allowed, and made a part of the record in said cause by Honorable Wm. H. Munger, the judge who presided at the trial of said cause, without further notice to plaintiff or his counsel.

MAHONEY AND KENNEDY,
Attorneys for Plaintiff.
B. P. WAGGENER,
F. A. BROGAN,
Attorneys for Defendant.

Dated at Omaha, Nebraska, May 25, 1910.

Now, in furtherance of justice and that right may be done, the defendant presents the foregoing as its Bill of Exceptions in this cause, and prays that the same, will be settled and allowed, signed and certified by the court, and made a part of the record in the cause, as provided by law.

B. P. WAGGENER,
F. A. BROGAN,
Attorneys for Defendant.

(Record, Page 305.)

The foregoing Bill of Exceptions contains all the evidence given or offered on the trial of the cause of Ozro Castle, Plaintiff, vs. Missouri Pacific Railway Company, Defendant, and correctly shows the proceedings on said trial, and said Bill of Exceptions is correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein.

Dated May 25th, 1910.

W. H. MUNGER,
Judge Presiding at said Trial.

Endorsed:—Filed May 25, 1910, Geo. H. Thummel, Clerk.

* * * * * * *

(Record, Page 307.)

Thereupon afterwards, to-wit:—On the 8th day of June, 1910, Assignment of Errors was filed in said case, which said Assignment of Errors is in words and figures following, to-wit:—

In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

OZRO CASTLE, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Assignment of Errors.

The Missouri Pacific Railway Company, the above named defendant and plaintiff in error, respectfully states that there is manifest error on the face of the record in the above entitled cause in the following particulars, to-wit:

I.

The Court erred in refusing to give the jury Instruction No. 4 requested by the defendant, as follows:

"The jury are instructed that it appears from the allegations of the petition and by the undisputed evidence in this case, that at the time the plaintiff sustained the injuries complained of he was in the service and the employ of the defendant company, an interstate carrier, upon a freight train of said defendant which said train was at the time engaged in trade and commerce between the states of Missouri, Kansas and Nebraska. And the defendant railroad company, being such interstate carrier, and the plaintiff, while so engaged, were each and both, so far as any liability on the part of the defendant, or right to recover for injuries sustained on the part of the plaintiff, were each and both, governed solely by the constitution and laws of the United States and if you find from the evidence in this case that the plaintiff was injured through the

negligence of either the engineer or conductor or both, while the plaintiff and said engineer and conductor were engaged in handling or moving said freight train so engaged in commerce between the states, or if you should find that the plaintiff, by his own failure to exercise reasonable and ordinary care, proximately contributed to cause the injury complained of then or in either of such events, the defendant company could not be held liable in damages and your verdict must be for the defendant."

To which ruling of the court the defendant at the time duly excepted.

II.

The Court erred in refusing to give to the jury Instruction No. 3 requested by the defendant, as follows:

"The jury are instructed that under the law the conductor, the engineer and the brakeman of a freight train, while engaged in moving and operating such train are what is known in the law as fellow servants and if either or any of such persons is injured while so engaged through the fault, neglect, carelessness or negligence of any one or the other of such persons, then the employer—in this case the defendant railroad company—could not be held liable for any damage which such person might sustain on account of such injuries. The law is that the master or employer cannot be held liable for any injury sustained resulting from the negligence of a co-employee or fellow servant, and you are thereon instructed that if you find from the evidence that the plaintiff was injured through the fault, neglect, omission or negligence of the engineer or the conductor in charge of and moving train No. 163 or a portion thereof, then the plaintiff would be held to have sustained such injuries through the negligence of a fellow servant for which the defendant company could not be held liable and your verdict must be for the defendant."

To which ruling of the court the defendant at the time duly excepted.

III.

The Court erred in refusing to give to the jury Instruction No. 1 requested by the defendant, as follows:

"The jury are instructed that the plaintiff has failed to make out or prove any cause of action in his favor against the defendant company and you will therefore find a general verdict in favor of the defendant Company."

To which ruling of the Court the defendant at the time duly excepted.

IV.

The Court erred in refusing to give to the jury Instruction No. 10 requested by the defendant, as follows:

"The jury are instructed that the testimony of a witness who is in position to hear and testifies that he did hear the bell ring is entitled

to more weight than the testimony of a witness who says that he did not hear the ringing of the bell."

To which ruling of the Court the defendant at the time duly excepted.

V.

The Court erred in instructing the jury as follows:

"If he were guilty of contributory negligence then you are to make a comparison of the negligence of the engineer and the negligence of the plaintiff and determine whether or not the negligence of the engineer was gross as compared with the negligence of the plaintiff. And then from the amount of damages you are to deduct or diminish them in proportion as you estimate or find the amount of negligence attributable to plaintiff."

To which the defendant at the time duly excepted as follows:

"Also, and in the presence of the jury and court, the defendant excepts to that part of the instructions of the court in which the court instructs the jury that if the plaintiff was guilty of negligence contributing to, or causing his injury, that would not bar a recovery if the negligence of the plaintiff was slight in comparison with the gross negligence of the defendant, there being no allegation of gross negligence in the petition, and no showing of that kind."

VI.

The Court erred in instructing the jury as follows:

"Then with regard to contributory negligence, the statute is as follows: 'That in all cases hereafter brought against any railway company to recover damages for personal injuries to any employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight, and that of the employer was gross in comparison, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.' "

To which the defendant excepted as follows:

"And further, and in the presence of the jury and court, the defendant excepts to that part of the instructions of the court which says that if the jury should find that both the plaintiff and defendant were guilty of negligence combining or contributing to the injury of the plaintiff, then the plaintiff would still be entitled to recover, but would be entitled only to a diminution of damage which was to be ascertained by the jury in comparing the one with the other.

VII.

The court erred in instructing the jury as follows:

"The Carlisle tables of life expectancy have been introduced in evidence for the purpose of giving you some indication as to the probable duration of life of a person at his age. You are not bound to accept the Carlisle tables as absolute and accurate, but they are proper evidence and should be considered by the jury in determining the probable duration of life. As I say, they are not absolute, because

we all know that a person of twenty-four years of age may be perfectly healthy today and in a month's time be dead from disease, while on the other hand, the tables of expectancy might fix a period of life at 38 years, or 40 years, and some people live a much longer period than that. So they are not absolute but they are based upon what years of experience have shown to be the average duration of life, and for that reason are accepted by the courts as competent evidence to be considered in estimating or determining the probable duration of life, and they should receive consideration at your hands in that respect, although they do not indicate absolutely just how long a person will live."

To which the defendant excepted as follows:

"And further, and in the presence of the jury and court, the defendant excepts to that part of the instructions of the court which refers to the Carlisle tables of expectancy, and directs the jury to consider the same in arriving at their verdict, if they find for the plaintiff, because the Carlisle tables of expectancy or other tables of life expectancy are not proper subjects of testimony or evidence, or properly to be considered by the jury in arriving at their verdict in an action where the injury has not resulted in death."

VIII.

The Court erred in instructing the jury as follows:

"If he were guilty of contributory negligence then you are to make a comparison of the negligence of the engineer and the negligence of the plaintiff and determine whether or not the negligence of the engineer was gross as compared with the negligence of the plaintiff."

To which the defendant excepted as follows:

"And further, and in the presence of the jury and court the defendant excepts to that part of the instructions of the court which states to the jury the measure of damage, in that it allows to the jury the right to compare the negligence of the plaintiff with the defendant and establishes a measure of damage unauthorized by law, and not applicable generally to actions at law."

IX.

The Court erred in sustaining the objection of the plaintiff to the question propounded by the defendant to the defendant's witness, Dr. W. H. Ramsey, as follows:

"Q. In what condition did you find his foot or his injury?" To which ruling of the Court the defendant excepted.

X.

The Court erred in sustaining the objection of the plaintiff to the offer of defendant to prove by the defendant's witness, Dr. W. H. Ramsey, that the injury to the plaintiff was an apparent one, about which there was no dispute, and that it consisted of a crushing injury to the right foot, showing that a wheel or some other heavy instru-

ment had passed over the foot from the outside to the inside, over the right foot and from the direction of the heel to the great toe.

To which ruling the defendant at the time excepted.

XI.

The Court erred in entering judgment upon the verdict in favor of the plaintiff and against the defendant.

B. P. WAGGENER,
F. A. BROGAN,
Attorneys for Defendant.

Endorsed: Filed Jun- 8, 1910, Geo. H. Thummel, Clerk.

(Record, Page 314.)

Thereupon afterwards, to-wit:—On the 8th day of June, 1910 Petition for Writ of Error was filed in said case, which said Petition for Writ of Error is in words and figures following, to-wit:

In the Circuit Court of the United States, for the District of Nebraska, Omaha Division.

OZRO CASTLE, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

The Missouri Pacific Railway Company, defendant in the above entitled cause, by B. P. Waggener and F. A. Brogan, its attorneys, feeling that it is aggrieved by the verdict of the jury and the judgment of the court entered on the 16th day of April A. D. 1910, petitions this Honorable Court for an Order allowing this defendant to prosecute a Writ of Error to the Supreme Court of the United States under and according to the laws in that behalf made and provided. And also that an order be made fixing the amount of surety which the defendant shall give and furnish upon said writ of error, and upon the giving of such surety all further proceedings in this court may be suspended and stayed until the determination of said writ of error in the Supreme Court of the United States.

And your petitioner will ever pray.

B. P. WAGGENER,
F. A. BROGAN,
Attorneys for the Missouri Pacific Railway Company, Defendant.

Endorsed: Filed June- 8, 1910, Geo. H. Thummel, Clerk.

* * * * * * *

(Record, Page 318.)

Thereupon afterwards, to-wit:—On the 8th day of June, 1910 a Writ of Error was allowed in said case, and a Citation duly signed and returned and filed on the 10th day of June, 1910, with acceptance of service endorsed thereon, the following of which are the originals:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Nebraska, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the April Term 1910, thereof, between Ozro Castle, Plaintiff, against The Missouri Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said The Missouri Pacific Railway Company, defendant, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington, and filed in the office of the Clerk of the Supreme Court of the United States on or before the 8th day of July 1910, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of June in the year of our Lord one thousand nine hundred and ten.

Issued at office in the City of Omaha, Nebraska, with the seal of the Circuit Court of the United States for the District of Nebraska, dated as aforesaid.

[Seal of United States Circuit Court, District of Nebraska, Omaha Division.]

GEO. H. THUMMEL,
Clerk Circuit Court United States,
District of Nebraska.

Allowed by
W. H. MUNGER, *Judge.*

Return to Writ.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Omaha, this 1st day of July A. D. 1910.

[Seal of United States Circuit Court, District of Nebraska, Omaha Division.]

GEO. H. THUMMEL,
Clerk of said Court.

Endorsed: No. 102 Y. United States Circuit Court District of Nebraska. Ozro Castle vs. Missouri Pacific Railway Company. Writ of Error to the Circuit Court of the United States for the District of Nebraska. Filed Jun- 8, 1910. Geo. H. Thummel, Clerk.

Citation U. S. Supreme Court.

The United States of America to Ozro Castle, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, thirty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the District of Nebraska, wherein The Missouri Pacific Railway Company is Plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable W. H. Munger Judge of the District Court of the United States for the District of Nebraska, this 8th day of June, in the year of our Lord one thousand nine hundred and ten.

W. H. MUNGER,
United States District Judge for the District of Nebraska.

Service of the within citation is hereby accepted, this 9 day of June, 1910.

T. J. MAHONEY,
J. A. C. KENNEDY,
Attorneys for Ozro Castle.

Endorsed: 102 Y. United States Circuit Court, District of Nebraska. Ozro Castle vs. Missouri Pacific Railway Company. Citation. Filed Jun- 10, 1910. Geo. H. Thummel, Clerk.

* * * * * * *

(Record, Page 321.)

Thereupon afterwards to-wit:—On the 22nd day of June, 1910 Præcipe for Transcript was filed in said case, which said Præcipe for Transcript is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

No. 102, Docket "Y."

OZRO CASTLE, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Præcipe for Transcript.

To the Clerk of said Court:

Please make Transcript for the Supreme Court of the United States in the above entitled cause and include therein the following:

1. Petition.
2. Answer.
3. Order, leave given to file reply.
4. Reply.
5. Order, Jury empanelled and sworn.
6. Motion for Non-suit, etc.
7. Order, Trial proceeds.
8. Order, Judgment and Verdict.
9. Instructions requested by plaintiff.
10. Motion and Instructions requested by defendant.
11. Order, leave given to file motion for new trial.
12. Motion for a new trial.
13. Bill of Exceptions.
14. Order, Motion for New trial overruled.
15. Assignments of Error.
16. Petition for Writ of Error.
17. Order Allowing Writ of Error.
18. Bond.
19. Writ of Error.
20. Citation.
21. Præcipe for Transcript.
22. Certificate of Clerk.

Dated this 22nd day of June, A. D. 1910.

B. P. WAGGENER,
FRANCIS A. BROGAN,
Attorneys for Defendant and Plaintiff in Error.

Endorsed: Filed Jun- 22, 1910. Geo. H. Thummel, Clerk.

(Record, Page 322.)

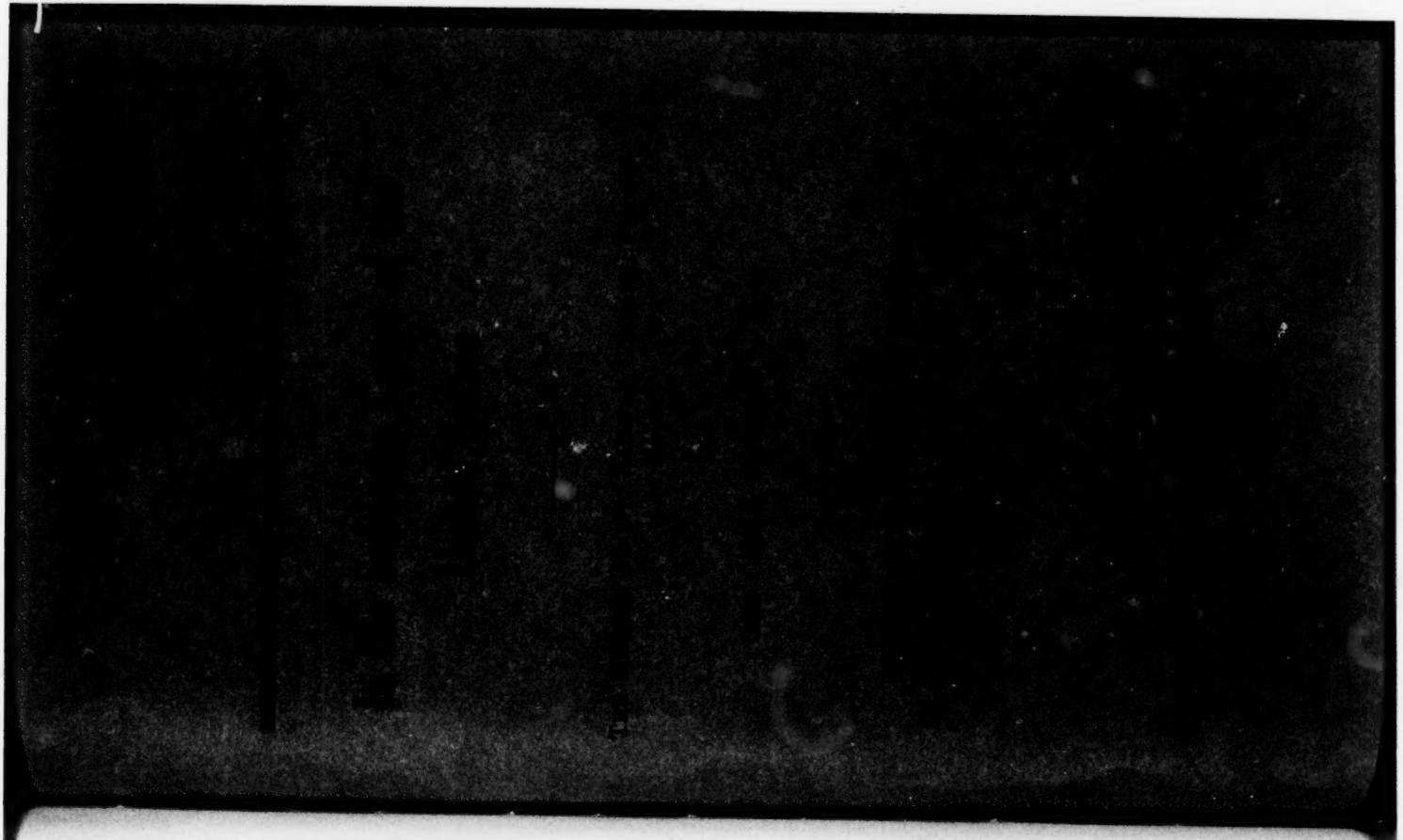
UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

I, Geo. H. Thummel, Clerk of the Circuit Court of the United States for the District of Nebraska hereby certify that pursuant to the foregoing Writ of Error and in obedience thereto and in compliance with the Præcipe, a copy of which is found on page 321 hereof, the foregoing record has been made and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said Court, as mentioned in said Præcipe and as indicated in the foregoing index, in the case of Ozro Castle vs. The Missouri Pacific Railway Company, No. 102 Docket "Y", and that copies of the Writ of Error and Citation, duly certified have been lodged and remain in my said office as such Clerk.

Witness my hand and the seal of said Court at Omaha in said District this 1st day of July, A. D. 1910.

[Seal of United States Circuit Court, District of Nebraska, Omaha Division.]

GEO. H. THUMMEL, *Clerk.*



In the Supreme Court of the United States

THE MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

OZRO CASTLE, *Defendant in Error.*

No. 344.

STATEMENT OF CASE OF PLAINTIFF IN ERROR.

It is alleged in the petition which was filed on the 5th day of June, 1908, in the Circuit Court of the United States for the District of Nebraska (Rec. p. 1), that:

> "1. This is an action of a civil nature, wholly between citizens of different states, and the matter and amount in controversy, exclusive of interest and costs, exceeds the sum of $2,000.
>
> 2. Plaintiff is a resident and citizen of the State of Nebraska, residing at Omaha, in said state.

3. The defendant is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and is a citizen of said State of Missouri.

4. The defendant Company is engaged in the owning and operating of a steam railway through the States of Missouri, Nebraska and elsewhere, and at all times hereinafter mentioned the defendant Company was so engaged.

5. At the time of the infliction of the injuries hereinafter described, plaintiff was in the employ of the defendant Company as a brakeman."

It is also further alleged, in paragraph 6, that:

"The train had just come into Auburn, from St. Joseph, Missouri," etc.

ASSIGNMENT OF ERRORS.

The plaintiff in error relies upon the assignment of errors set forth in the transcript (Rec. pp. 21-25), but for the convenience of the Court in consideration of the motion to affirm, condenses the same under the following heads, and will present the same hereafter in Brief and Argument in the order stated, *viz.:*

FIRST.

The court below was without jurisdiction of the parties and subject matter, and committed manifest error in rendering any judgment in favor of the plaintiff and against the defendant Company.

SECOND.

The defendant Company, as alleged in the petition (Rec. p. 1), being an interstate carrier, and engaged in the owning and operating of a steam railway through the States of Missouri, Nebraska and elsewhere, and at the time of the injury complained of, *viz.*, the 2d day of October, 1907, being engaged in the operation of an interstate train, Chapter 48, Session Laws of Nebraska 1907, could not lawfully give to an employe of such carrier a remedy for an injury sustained by him while engaged in such service, and said statute of Nebraska is in

contravention of the Commerce clause of the Constitution, and the various Acts of Congress enacted in pursuance thereof.

THIRD.

That Chapter 48 of Session Laws, Nebraska 1907, and especially the second section thereof, is in conflict with the Constitution of the United States, and deprives the Railway Company of its property without due process of law, and denies to it that equal protection of the law guaranteed to it by Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

BRIEF AND ARGUMENT.

FIRST.

The court below was without jurisdiction of the parties and subject matter, and committed manifest error in rendering any judgment in favor of the plaintiff and against the defendant Company.

If the court below was without jurisdiction of the parties or subject matter, its judgment is erroneous, if not void.

It is alleged in the petition (Rec. p. 1) that the defendant is "a corporation organized and existing under and by virtue of the laws of the State of Missouri, and is a citizen of said State of Missouri," and the answer admits that "it is now, and at all the times mentioned in said petition was, a railway corporation, organized and existing under and by virtue of the laws of Missouri."

It is alleged in the petition (Rec. p. 1) that:

> "Plaintiff is a resident and citizen of the State of Nebraska, residing at Omaha in said state."

If, therefore, the defendant Company, although originally incorporated under the laws of the State of Missouri, had in law and in fact become a domestic corporation in Nebraska, under the Constitution and

laws of that state, and was such domestic corporation when this suit was instituted, the requisite diverse citizenship did not exist, and the Circuit Court of Nebraska did not have any jurisdiction.

It is alleged in the petition (Rec. p. 1) that:

> "The defendant Company is engaged in the *owning* and operation of a steam railway through the States of Missouri, *Nebraska* and elsewhere, and *at all times* hereinafter mentioned the defendant Company was so engaged."

If the defendant Company, as incorporated under the laws of the State of Missouri, did not, under the Constitution of Nebraska, have power to acquire a right-of-way in the state until it had become a body corporate, pursuant to and in accordance with the laws of the state, then our contention is that the allegation in the petition that "the defendant Company is engaged in the *owning* and operating of a steam railway in the State of Nebraska," is equivalent to an allegation that the defendant Company, as incorporated under the laws of Missouri, had become a body corporate, pursuant to and in accordance with the laws of the State of Nebraska, and was therefore a domestic corporation in that state, although it was at the same time a corporation of and existing under the laws of Missouri.

The Constitution of Nebraska (Sec. 8, Art. 1, Comp. Stat. Neb. 1905, pp. 74-75), provides that:

> "Section 8. No railroad corporation organized under the laws of any other state or of the United States, and doing business in this state,

> shall be entitled to exercise the right of eminent domain, or *have the power to acquire the right-of-way* or real estate, for depot or other uses, until it shall have become a body corporate, pursuant to and in accordance with the laws of this state."

This section of the Constitution has been several times construed by the Supreme Court of Nebraska.

> *State ex rel., etc.* v. *Scott*, 22 Neb. 628.
> *Trester* v. *Mo. Pac.*, 23 Neb. 243-249.

(The Missouri Pacific Railway Company in that case is the plaintiff in error in the case at bar.)

> *State* v. *C. B. & Q. R. R. Co.*, 25 Neb. 156.

In the case of *State ex rel., etc.* v. *Mo. Pac. Ry. Co.*, 25 Neb. 164-165, an ouster proceeding was instituted against the Missouri Pacific Railway Company (this plaintiff in error) by the Attorney General, upon the averment that it was a "corporation organized and existing under the laws of Missouri, and not incorporated under the laws of the State of Nebraska," etc. The court found and held that, because of consolidations with domestic companies, the Missouri Pacific Company had become a domestic corporation in the State of Nebraska, and could therefore "acquire a right-of-way," etc.

In the case of *Trester* v. *Mo. Pac. Ry. Co., supra*, the Supreme Court of Nebraska, construing the Constitution of that state, among other things, said (23 Neb. 248) :

> "If the defendant was a foreign corporation, * * * it not only could not exercise the right of eminent domain, but it had no power to acquire the right-of-way in any form. It could do nothing. * * * Our state Constitution is not a system of directory enactments to be observed or not, at the pleasure of litigants; but its provisions, so far at least as they are applicable to the case at bar, are mandatory, and no right can be acquired except by obedience thereof."

It certainly will not be presumed that the Missouri Pacific Railway Company, although incorporated and existing under the laws of Missouri, was at the time an outlaw in the State of Nebraska, while "engaged in *owning* and operating a steam railway" in that state. Yet, in order to reach the conclusion that the requisite diverse citizenship existed when this suit was instituted, this Court must indulge the presumption that it was in open defiance of the Constitution and laws of the State of Nebraska while "engaged in *owning* and operating" a line of railway in that state.

This Court, in the case of *Thomas* v. *Bd. Trustees*, 195 U. S. 210, among other things, said:

> "That the jurisdiction of a Circuit Court of the United States is limited in the sense that it has no jurisdiction except that conferred by the Constitution and laws of the United States; that a cause is presumed to be without its jurisdiction unless the contrary affirmatively appears; that such jurisdiction, or the facts upon which in legal intendment it rests, must be distinctly and positively averred in the pleadings, or should appear affirmatively, and with equal distinctness

in other parts of the record, it not being sufficient that jurisdiction may be inferred argumentatively. * * *

It is equally well established that when jurisdiction depends upon diverse citizenship, the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal, and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived.

Mansfield, C. & L. M. Ry. Co. v. *Swan,* 111 U. S. 379.

Martin v. *B. & O. R. R. Co.,* 151 U. S. 673, 689.

Powers v. *Chesapeake & Ohio Ry. Co.,* 169 U. S. 92, 98.

As late as in *Minnesota* v. *Northern Securities Co.,* 194 U. S. 48, 62, 63, we said, both parties insisting upon the jurisdiction of the Circuit Court: 'Consent of the parties can never confer jurisdiction upon a Federal Court. If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own motion, so declare and make such order as will prevent that court from exercising an authority not conferred upon it by statute.'

So that the fact stated in the certificate that neither party in the Circuit Court objected to its jurisdiction is of no consequence."

In the case of *Fore River Shipbuilding Co.* v. *Hagg,* 219 U. S. 177, it was said by this Court that:

"This Court takes notice of its own jurisdiction, and whether the question is raised by the counsel or not, inquires of its own motion whether there is jurisdiction to entertain any given case before it."

Mansfield, Coldwater & Lake Michigan Ry. Co. v. *Swan,* 111 U. S. 379-382.

In that case, Mr. Justice Matthews, who spoke for the Court, said:

> "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this Court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

We assume, therefore, that if it appears from the record that the requisite diverse citizenship did not exist at the time of the institution of the suit, the Circuit Court was without jurisdicion to render a judgment against the defendant Railway Company, and that to do so is reversible error.

From the fact that it is conceded in the petition of plaintiff that the Missouri Pacific Railway Company is a foreign corporation, incorporated originally under the laws of the State of Missouri, and acquired such a status in the State of Nebraska that it could lawfully "*engage* in *owning* and operating a line of railway" in that state, in the absence of anything further appearing, should it not be conclusively presumed that it had, under the Constitution of the State of Nebraska, as construed by the Supreme Court of that state, become a domestic corporation of that state?

In the case of *Secombe* v. *R. R. Co.*, 23 Wallace (U. S.) 108, it was said that:

> "When the question is whether, under the Constitution and laws of a particular state, a company professing to be a corporation is legally so, this Court will receive as conclusive of

> the question the decision of the highest court of the state deciding, in a case identical in principle, in favor of the corporate existence."

Also, in the case of *Lamar* v. *Micou*, 114 U. S. 223, it was said that:

> "The law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof. *Owings* v. *Hull*, 9 Pet. 607; *Pennington* v. *Gibson*, 16 How. 65; *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227."

In the case of *Robertson* v. *Cease*, 97 U. S. 649, it was said:

> "As the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the Constitution and laws of the United States, the presumption now, as well as before the adoption of the Fourteenth Amendment, is, that a cause is without its jurisdiction unless the contrary affirmatively appears. In cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctively and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record."
>
> *Bors* v. *Preston*, 111 U. S. 255.

The question of the status of the Missouri Pacific Railway Company was considered by the Circuit Court of Appeals in the case of *Mo. Pac. Ry. Co.* v. *Meeh*, 69 Fed. Reptr. 753, and in that case it was said:

> "Instead of merely licensing a foreign corporation to operate a railroad or to transact any other business within its borders, a state may, for reasons of its own, adopt the foreign corporation by creating it a domestic corporation, with the same franchises and powers that it exercises in the state which originally created it, or with powers that are less or more extensive. When a state pursues the latter course, and adopts the foreign corporation as one of its own creation, it follows, we think, that all of its subsequent acts and transactions within the state of its adoption are the acts of a domestic corporation, that the franchises and powers there exercised were conferred by local laws, and that process served upon its officers or agents within the state is served upon the domestic corporation rather than upon the foreign corporation of the same name."

In the case of *Winn* v. *Wabash R. R. Co.*, 118 Fed. Reptr. 55, the court had under consideration the Articles of Consolidation of the Wabash Company in the State of Missouri, and among other things, it was said:

> "That the consolidated corporation thereby became a citizen of each of the states in which the articles were so filed, subject to its laws, and therefore such corporation is not entitled to remove an action arising in Missouri to the Federal Court on the ground that it is a resident of another state."

The injury to the plaintiff occurred in the State of Nebraska. His cause of action, if he had any, accrued there. In the light of the Constitution of that state, as construed by the Supreme Court of that state (*State ex rel., etc.* v. *Mo. Pac. Ry. Co.*, 25

Neb. 164-165), the "Missouri Pacific Railway Company in Nebraska was a domestic corporation," created and existing under the laws of that state, and it is alleged to have incurred a liability *there* to the plaintiff, a citizen of that state.

Is not the question concluded and settled by this Court in the case of *Patch* v. *Wabash Ry. Co.*, 207 U. S. 277, 281-284? Will not this Court take judicial notice of the fact, as disclosed by the Constitution and laws of Nebraska, and decisions of the Supreme Court of that state, that the Missouri Pacific Railway Company had no status in that state, except as a domestic corporation, organized, created and existing under the laws of that state?

> *Texas & Pac. Ry. Co.* v. *Cody*, 166 U. S. 606-610.

In the case of *Fitzgerald* v. *Mo. Pac. Ry. Co.*, 45 Fed. 812, the whole question as to the status of the Missouri Pacific Railway Company in the State of Nebraska was considered by the Circuit Court (Caldwell, J.), and it was decided that:

> "The decision of the Supreme Court of the state that a particular corporation is a corporation of that state is binding on the Federal Court.
>
> When a consolidated company is formed by the union of several corporations chartered by different states, it is a citizen of each of the states which granted the charter to any one of its constituent companies, and when sued in one of these states it cannot claim the right of removal on the ground that it is also a citizen of another state.
>
> A consolidated corporation which bears the

same name in three states, and has one board of directors and the same shareholders, and operates the road as one entire line, and is designed to accomplish the same purposes, and exercises the same general corporate powers and functions in all the states, is not the same corporation in each state. While it is a unit, and acts as a whole, in the transaction of its corporate business it is not a corporation at large, nor is it a joint corporation of the three states. Like all corporations, it must have a legal dwelling place, and it dwells in three states, and is a separate and single entity in each. It is, in effect, a corporate trinity, having no citizenship of its own, distinct from its constituent members, but a citizenship identical with each.

In the conduct of its corporate business, the consolidated corporation acts as a unit—as one corporation, and not three; and in the absence of a statutory provision to the contrary, it may transact its corporate business in one state for all, and the contracts it enters into, and the liabilities it occurs in one state, are binding upon it in all the states, and may be enforced against it in any one of them, when the action is transitory."

And in the opinion it is further said that:

"The Supreme Court of Nebraska has decided that the Railway Company is a corporation of the state. The decision was rendered in a case brought against the Railway Company for the purpose of determining that question. (*State* v. *Ry. Co.*, 25 Neb. 164, 41 N. W. Reptr. 127.) The decision is conclusive upon the question in this Court, and puts an end to the defendant's claim to remove this cause on the ground of citizenship. * * *

For the purpose of jurisdiction in the Federal Courts, and securing to the states the exercise of their just powers over corporations

> of their own creation, and over property within their jurisdiction, the consolidated company is conclusively presumed to be a citizen of each of the states whose laws and corporations contributed to its formation. It enjoys in each state all the powers and privileges the corporation there chartered had, and must answer in the courts and is amenable to the laws of each state respectively, as a corporation of that state."

It appears, therefore, that the Supreme Court of the State of Nebraska has held that the Missouri Pacific Railway Company was a domestic corporation of that state.

State v. *Ry. Co.*, 25 Neb. 164.

And the Circuit Court of the United States for the District of Nebraska has decided that it was a domestic corporation, and a citizen of that state.

Fitzgerald v. *Mo. Pac. Ry. Co.*, 45 Fed. Rep. 812-816.

And also the Circuit Court of Appeals (Eighth Circuit) has decided that it was a citizen of each the States of Nebraska, Kansas and Missouri.

Mo. Pac. Ry. Co. v. *Meeh*, 69 Fed. 753.

SECOND.

The defendant Company, as alleged in the petition (Rec., p. 1), being an interstate carrier, and engaged in the owning and operating of a steam railway through the States of Missouri, Nebraska and elsewhere, and at the time of the injury complained of, viz., the 2d day of October, 1907, being engaged in the operation of an interstate train, Chapter 48, Session Laws of Nebraska 1907, could not lawfully give to an employe of such carrier a remedy for an injury sustained by him while engaged in such service, and said statute of Nebraska is in contravention of the Commerce clause of the Constitution and the various Acts of Congress enacted in pursuance thereof.

The title of Chapter 48, Laws of Nebraska (Rec. p. 6), under which a liability is claimed herein, provides that:

> "An Act imposing liability upon railway companies in favor of employes on account of injury resulting from the negligence of the fellow servants, or the negligence of employes of such railway company, or *on account of defective appliances, tracks, roadbed, or works,*" etc.

Section 1 of the Act (Rec. p. 6) enlarges the scope of the title by adding, *"by reason of any defects or insufficiency in its cars, engines, appliances, machinery, track, roadbed, ways or works."*

The Act of Congress of March 2d, 1893 (27 Stat. 531), entitled: "An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate com-

merce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes," went into effect January 1st, 1898. The Act of Congress of March 3d, 1901 (31 Stat. 1446), entitled: "An Act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission," went into effect March 3d, 1901. By these Acts, and the Acts amendatory thereof, it was clearly the purpose of Congress to "promote the safety of employes" engaged in the service of an interstate carrier.

Johnson v. *Ry. Co.*, 196 U. S. 1.
Schlemer v. *Ry. Co.*, 205 U. S. 1.
Ry. Co. v. *Taylor*, 210 U. S. 281.

The Acts are property denominated "The Safety Appliance Acts."

In 1906 Congress passed the Act, entitled: "An Act relating to liability of common carriers in the District of Columbia and Territories, and common carriers engaged in commerce between the states and between the states and foreign nations to their employes." (32 Stat. 232.)

It will be observed that Section 1, Chapter 48, Laws of Nebraska (Rec. p. 6), is almost identically the same as Section 1, Act of Congress, cited *supra*, approved June 11th, 1906:

Sec. 1. Act of Congress.	Sec. 1. Laws of Nebraska.
" * * * shall be liable to any of its employes, or, in the case of his death, to his personal representative, for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents or employes, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works."	" * * * shall be liable to any of its employes who, at the time of injury are engaged in construction or repair work, or in the use and operation of any engine, car or train for said company, or, in the case of his death, to his personal representatives, for the benefit of his widow and children, if any; if none, then to his parents; if none, then to his next of kin dependent upon him, for all damages which may result from negligence of any of its officers, agents or employes, or by reason of any defects or insufficiency in its cars, engines, appliances, machinery, track, roadbed, ways or works."

Sections 2 and 3 of the Act of Congress, approved June 11th, 1906, and Sections 2 and 3 of the Nebraska Act, Chapter 48 (Rec. pp. 6-7), are identically the same. The Nebraska Act has no limitations or restrictions, but applies to all employes, whether engaged in state or interstate commerce. Notwithstanding Congress, by the Safety Appliance Act, cited *supra*, has legislated fully with reference to defective appliances used by an interstate carrier, the legislature of Nebraska, in Chapter 48, *supra*, has again covered the whole field, by giving a cause

of action for damages which result by "reason of any defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, ways or works." That the latter clause of the Nebraska Act (Chapter 48) is inoperative, under the recent decisions of this Court in:

Mondou v. *N. Y. N. H. & H. R. R. Co.*, Vol. 32, No. 6, Sup. Ct. Repts. 169-178;
Northern Pac. v. *Washington*, Vol. 32, Sup. Ct. Repts. 160;
Southern Ry. Co. v. *Reid*, Vol. 32, Sup. Ct. Repts. 140,

there would seem to be no doubt. Congress, by its legislation on the subject of "Safety Appliances" on interstate trains, has certainly superseded the right of the State of Nebraska to legislate on the subject.

If we are correct in this conclusion, then is not the entire Act of the Legislature of Nebraska (Chapter 48) inoperative and void, under the decision of this Court in THE EMPLOYER'S LIABILITY CASES, 207 U. S. 462? Does not the same principle invoked to destroy the Act of Congress approved June 11th, 1906, apply with greater force to invalidate the Act of the Legislature of Nebraska (Chapter 48), which is the basis of this action?

The Act of Congress approved June 11th, 1906, was held to be void, and beyond the power of Congress, because it trenched upon the exclusive power of the states. Therefore does it not necessarily follow that the Act of the Legislature of Nebraska (Chapter 48, Laws 1905) is void, because in its terms—its operation—its effect—it trenches upon the exclusive power of Congress?

Again, it must not be overlooked that, so far as disclosed by the record, the Missouri Pacific Railway Company was engaged exclusively in interstate commerce (Rec. p. 1), and the train which caused the injury "had just come into Auburn from St. Joe, Missouri." The Statute of Nebraska (Chapter 48), by its express terms, undertakes to regulate "the *use* and *operation* of *any* engine, car or train," and, as applied to the case at bar, a train alleged and conceded to be an interstate train, engaged in interstate commerce. Can there *lawfully* be a divided jurisdiction and authority over such a train? Can Congress, by legislation, provide for and prescribe the "Safety Appliances" which shall be used, and the State Legislature prescribe the care and diligence to be observed by the employes who use such "Safety Appliances"? Suppose an injury results from the combined neglect of the Railway Company to provide the "Safety Appliances," required by the Act of Congress, and the negligence of a fellow-servant, made actionable by the state law. Which law would be paramount? Under the state statute contributory negligence is not a defense, while under the Act of Congress it would be a defense. Which law would govern?

In the case of *Mondou* v. *R. R. Co.*, cited *supra*, Mr. Justice Vandeventer, among other things, said:

> "The duties of common carriers in respect of the safety of their employes, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power."

The Act of Congress of March 2d, 1893 (27 Stat. 531), was "An Act to promote the safety of employes," etc., by prescribing certain things to be done by carriers of interstate commerce, to protect their employes while engaged in interstate commerce. Congress may not have gone far enough in that legislation (see Employer's Liability Acts, approved June 11th, 1906, and approved April 2d, 1908); nevertheless, having acted with reference to the subject matter of "promoting the safety" of employes engaged in the operation of interstate trains, were not all "laws of the several states, in so far as they cover the same field," superseded by such action of Congress? The subject matter of the legislation was the "safety of employes engaged in interstate commerce."

As said by the Solicitor General, quoted approvingly by this Court in *Mondou* v. *Ry. Co.*, cited *supra:*

> "Interstate commerce, if not always, at any rate when the commerce is transportation, is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention of interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes

> slow or costly, or unsafe, or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

If Congress does not go far enough in its legislation to "promote the safety" of these employes, agents or instruments of interstate commerce, may the state, by legislation along the same lines, provide additional safeguards and precautions?

In the case of *Prigg* v. *Commonwealth*, 16 Peter 539, Mr. Justice Story, in delivering the opinion of the court, among other things, said (p. 618):

> "The legislation of Congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it. For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it

does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. *Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it.* This doctrine was fully recognized by this Court in the case of *Houston* v. *Moore*, 5 Wheat. 1, 21, 22, where it was expressly held that where Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for state legislation to add to the provisions of Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it had not declared as by what it has expressed."

This doctrine was referred to and approved by this Court in *Sinott* v. *Davenport*, 22 Howard 231.

And in the case of *Hall* v. *DeCuir*, 95 U. S. 506:

"Throughout our history the Act of Congress have regulated the enrolment and license of vessels to be engaged in the coasting trade, and this Court expressly determined that a state law which imposed another and an additional condition to the privilege of carrying on that trade within her waters is inoperative and void."

Cooley v. *Bd. Wardens*, 10 Howard 299.
Sturgis v. *Crowninshield*, 4 Wheat. 122.
Brown v. *Maryland*, 12 Wheat. 419.

The reasoning of Mr. Justice Washington in the case of *Houston* v. *Moore*, 5 Wheat. (U. S.) 23, would seem to be most applicable here:

"If, in a specified case, the people have thought proper to bestow certain powers on

Congress as the safest depositary of them and Congress has legislated within the scope of them, the people have reason to complain that the same powers should be exercised at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment for a certain offense, the presumption is that this was deemed sufficient, and under all circumstances, the only proper one. If the other legislature impose a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together.

I admit that a legislative body may by different laws impose upon the same person, for the same offense, different and cumulative punishments; but then it is the will of the same body to do so, and the second, equally with the first law, is the will of that body. There is, therefore, and can be, no opposition of wills. But the case is altogether different, where the laws flow from the wills of distinct, co-ordinate bodies.

This course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine, that in cases where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which Congress has acted, provided the two laws are not

in terms, or in their operation, contradictory and repugnant to each other."

Therefore, it seems to be settled by this Court that:

> "Congress having legislated upon *the subject*, it cannot be that the state legislature have a right to interfere and prescribe *additional* regulations," etc.

The attention of the Court is called to the very recent decision of this Court in the case of *Northern Pac. R. R. Co.* v. *Washington*, 32 Sup. Ct. Rept. 161, in which Mr. Chief Justice White said:

> "It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject, or manifests its purpose to call into play its exclusive power. This being the conceded promise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the state."

In the case of *Southern Ry. Co.* v. *Reid*, 222 U. S. —, it was said that:

> "Inhibitive congressional legislation is not essential to exclude state legislation upon incidental matters relating to interstate commerce with respect to which the states and Congress have a concurrent power. It is sufficient if the

congressional legislation occupies the field of regulation."

Southern Ry. Co. v. *U. S.*, 222 U. S. 20-27.

Under the decision of this Court in *Mondou* v. *R. R. Co.*, cited *supra*, the employes of a carrier engaged in interstate commerce are as much instruments of that commerce as the engines and cars used in its transportation, and Congress, by and through the "Safety Appliance Acts," having attempted to promote their safety, by appropriate legislation, the dominion and jurisdiction of the state over them, as such employes, is superseded and withdrawn, and legislation of the state to promote their safety is only an additional precaution, supplemental to legislation by Congress, and is inoperative and void.

If the "dining car" (*In re Johnson v. Southern Pac. R. R. Co.*, 196 U. S. 1), while standing on the side track, was an instrument of interstate commerce, and under the control of Congress while *thus* in the *act* of making an interstate journey (196 U. S. 22), most certainly the plaintiff, while engaged in the *actual* operation and movement of such interstate train, was a potential factor in the movement of interstate commerce, and under the protecting care of Federal legislation enacted in response to recommendation of President Harrison, in which he urged that it was a "reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful avocation, be subject to a peril of life and limb as great as that of a soldier in time of war." So Congress, by affirmative legislation, made such employes agents and instruments of interstate commerce, and undertook to "promote the safe-

ty" of such employes by Act of March 2d, 1893, and kindred statutes, which have been sustained by this Court in various cases.

Johnson v. *Southern Pac. R. R. Co.*, 196 U. S. 1.
Schlemmer v. *R. R. Co.*, 205 U. S. 1.
St. L. I. M. & S. v. *Taylor*, 210 U. S. 281.
C. B. & Q. v. *U. S.*, 220 U. S. 559.
Schlemmer v. *R. R. Co.*, 220 U. S. 590.
Delk v *St. L. & San Fran. R. R. Co.*, 220 U. S. 580.

It will be seen that Congress, since 1893, has repeatedly legislated upon the subject of "promoting the safety of employes."

1. Act of March 2d, 1893, Ch. 196, 27 Stat. L. 531: "An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotive with driving wheel brakes, and for other purposes."

2. Act of April 1st, 1896, Ch. 87, 29 Stat. L. 85. Striking out proviso of Sec. 6, Act March 2d, 1893, and inserting a new proviso in the section.

3. Act of March 3d, 1901, Ch. 866, 31 Stat. L. 1446: "An Act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission."

4. Act of March 2d, 1903, Ch. 976, 32 Stat. L. 943: "An Act to amend an Act entitled 'An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with auto-

matic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes,'" approved March 2d, 1893, and amended April 1st, 1896.

5. Act of March 4th, 1907, Ch. 2939, 34 Stat. L. 1415: "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon."

6. Act of April 22d, 1908, Ch. 149, 35 Stat. L. 65: "An Act relating to the liability of common carriers by railroad to their employes in certain cases."

7. From the Sundry Civil Appropriation Act of May 27th, 1908, Ch. 200, 35 Stat. L. 325: "Providing for investigation of safety appliances, etc., by Commission."

8. Act of May 30th, 1908, Ch. 225, 35 Stat. L. 476: "An Act to promote the safety of employes on railroads."

9. From the Sundry Civil Appropriation Act of March 4th, 1909, Ch. 299, 35 Stat. L. 965: "Railway safety appliances; inspection; reports on mail cars."

The "subject matter" of the Nebraska Act (Ch. 48, L. 1905) is "to promote the safety of employes" engaged in the service of railway companies. The "subject matter" of the various Acts of Congress cited *supra* is to "promote the safety of employes" engaged in the service of interstate carriers. As applied to the latter class of employes, can the two statutes co-exist and co-operate? Suppose Congress, for the purpose of "promoting the safety" of employes, had only legislated upon the subject of automatic couplers on freight trains, would it be competent for

the state legislature, under the guise of likewise "promoting the safety of employes," to require railway companies to equip all freight trains with air brakes, and thereby give to an employe of an interstate carrier a cause of action for an injury sustained while *actually* engaged in such service, because the carrier had neglected to equip the train with air brakes, as required by the state statute? If so, then the legislature of each state through which an interstate carrier operates its line, becoming dissatisfied with the rules and regulations of Congress for the "promotion of the safety" of such carrier's employes, may supplement the legislation of Congress with additional precautions, which may be different in each particular state, and thereby the exclusive power vested by the Constitution in Congress divested and parceled out to the several states.

The "Act to Regulate Commerce," known as the Hepburn Bill, provides that:

> "The term 'common carrier,' as used in this Act, shall include express companies and sleeping car companies. The term 'railroad,' as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under contract, agreement or lease, and shall also include all switches, spurs, tracks and terminal facilities, of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all in-

> strumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

And this Court, in *Ry. Co.* v. *Interstate Comm. Commission,* 162 U. S. 212, said that:

> "It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state) as well as that between the states and territories as that going to or coming from foreign countries."
> *So. Ry. Co.* v. *U. S.,* 222 U. S. —.

Thus it will be seen that Congress has enacted many laws in regard to the subject of "promoting the safety of employes" of interstate carriers—instruments of interstate commerce—and has thereby *occupied the field,* to the exclusion of all state statutes on the same subject.

> *So. Ry. Co.* v. *Reid,* 222 U. S. 444.
> Employer's Liability Cases, 223 U. S. 1-53.
> *Ry. Co.* v. *King,* 223 U. S. —.

a. The injury complained of occurred on the 2d day of October, 1907. The Act of Congress entitled "An Act relating to liability of common carriers by railroad to their employes in certain cases" was approved April 22d, 1908, and was in effect prior to the 5th day of June, 1908, when this action was first instituted in the Circuit Court.

The question here presented is as to the effect of the Act entitled: "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April 22d, 1908, upon the cause of action, if any, which accrued to the plaintiff on the 2d day of October, 1907, but the enforcement of which was not attempted until the 5th day of June, 1908. (Rec., p. 3.)

In the recent case of *Mondou* v. *R. R. Co.*, 222 U. S., it was held that:

> "The laws of the several states, in so far as they cover the same field, were superseded by the enactment by Congress of the Employer's Liability Act of April 22d, 1908, regulating the liability of interstate railway carriers for the death or injury of their employes while engaged in interstate commerce."

If, therefore, as decided by the Court in that case, the laws of the states, "in so far as they cover the same field," are superseded, what effect did such legislation have upon the laws of Nebraska, Ch. 48, Laws 1907, invoked as the basis for the cause of action in this controversy? It is provided by the Constitution of the United States that:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be held to be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The Employer's Liability Act, approved April 22d, 1908, had in it no saving clause as to causes of action which had accrued under state laws upon the same subject at the time of passage of that Act.

If the Act of the Legislature of Nebraska, Ch. 48, Laws 1907, was superseded by the Employer's Liability Act of April 22d, 1908, it was thereby rendered "useless, by superior power." It was "set aside" and "unnecessary." It was "suspended" (see definition of "superseded," Webster's Dictionary), and no action could be maintained thereunder, after April 22d, 1908, in favor of an employe of an interstate carrier, even though his cause of action accrued prior to April 22d, 1908.

It may be said that, as thus applied, the Act would be retrospective. In the case of *Stephens* v. *Cherokee Nation*, 174 U. S. 477, this Court said:

> "The contention is that the Act of July 1st, 1898, in extending the remedy by appeal to this Court was invalid because retrospective, an invasion of the judicial domain, and destructive of vested rights. By its terms, the Act was to operate restrospectively, and as to that it may be observed that while the general rule is that statutes be so construed as to give them only prospective operation, yet where the language employed expresses a contrary intention in un-

equivocal terms, the mere fact that the legislation is retroactive does not necessarily render it void."

In the case of *Satterlee* v. *Matthewson*, 2 Pet. U. U. 413, it was said that:

> "If the effect of the statute in question be not to impair the obligation of either of those contracts, and none other appear upon this record, is there any other part of the Constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so—but retrospective laws, which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument."

In the case of *League* v. *Texas*, 184 U. S. 156, it was said:

> "The Fourteenth Amendment contains no prohibition of retrospective legislation as such, and therefore now, as before, the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution."

If the Employer's Liability Act, approved April 22d, 1908, superseded "the laws of the several states, in so far as they cover the same field," as held by this Court in *In re Mondou* v. *R. R. Co., supra* (*So. Ry. Co.* v. *Reid*, 222 U. S. 424; *So. Ry. Co.* v. *Reid*, 222 U. S. 444; Employer's Liability Cases, 223 U. S. 1-53), then the Nebraska Act, Ch. 48, Laws of 1907 (Rec. p. 6), was superseded so far as concerned employes of interstate carriers, for the two acts cover literally the *same field* as to such employes.

Suppose the Legislature of Nebraska, on April

22d, 1908, had repealed Ch. 48, Laws of Nebraska 1907, without any saving clause as to actions pending or causes of actions which had accrued under it, could the plaintiff thereafter have maintained his action under the statute which had been repealed? Clearly not.

In the case of *Bennett, Admt.*, v. *Hargus*, 1 Neb. 419, the Supreme Court of Nebraska held and decided that:

> "A right of action or remedy founded solely upon a statute or suit to enforce such remedy, not prosecuted to judgment, is determined by the repal of the statute."

The Employer's Liability Act, approved April 22d, 1908, was passed by Congress in the exercise of its exclusive power over the subject-matter. This Court holds that the exercise of that power by Congress superseded *all* state laws on the same subject, which included beyond question the act of the Nebraska legislature, the basis of this action. Will it be said that the repeal of the statute by the legislature which enacted it, would have been more effective as to existing causes of action under it than the *suspension* and *superseding* of the same act by Congress, which has, when it does act, *exclusive* power over the same subject?

Ins. Co. v. *Ritchie*, 5 Wall. 541.

In *In re Ex Parte McCardle*, 7 Wall. 514, this Court held that:

> "No judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted."

In the case at bar the plaintiff brought his suit (June 5th, 1908) after the Nebraska statute upon which it was based had been superseded (repealed) by the Employer's Liability Act, approved April 22d, 1908.

In the case of *South Carolina* v. *Gaillard*, 101 U. S. 433, this Court held and decided that:

> "After that act was repealed, a party could not institute a proceeding to avail himself of the remedy which it furnished, and all suits then pending thereunder terminated, there being no saving clause as to them."
>
> *The Assessors* v. *Osborne*, 9 Wall. 567.
> *District of Col.* v. *Hutton*, 143 U. S. 18.
> *United States* v. *Ranlett*, 172 U. S. 133.

THIRD.

That Chapter 48 of Session Laws of Nebraska 1907, and especially the second section thereof, is in conflict with the Constitution of the United States, and deprives the Railway Company of its property without due process of law, and denies to it that equal protection of the law guaranteed to it by Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

It is provided by the second section of Ch. 48, Laws of Nebraska 1907 (Rec. pp. 6-7), that:

> "In all actions hereafter brought against any railway company to recover damages for personal injuries to an employe, or when such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight, and that of the employer was gross in comparison, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. All questions of negligence and contributory negligence shall be for the jury."

In its answer (Rec., pp. 4-5) defendant averred that the said Sec. 2 of Ch. 48, Session Laws of Nebraska 1907, was in contravention of that part of Sec. 1 of the Fourteenth Article of Amendment to the Constitution of the United States, which provides:

> "No state shall make or enforce any law * * * which shall abridge the privileges or immunities of citizens of the United States; * * * nor deny to any person within its jurisdiction the equal protection of the laws."

And, at the conclusion of the evidence, the defendant company asked the court to give the jury the following instruction:

> "The jury are instructed that it appears from the allegations in the petition, and by the undisputed evidence in this case, that, at the time the plaintiff sustained the injuries complained of, he was in the service and the employ of the defendant company, an interstate carrier, upon a freight train of said defendant, which said train was at the time engaged in trade and commerce between the states of Missouri, Kansas and Nebraska. And the defendant railroad company, being such interstate carrier, and the plaintiff, while so engaged, were each and both, so far as any liability on the part of the defendant or right to recover for injuries sustained on the part of the plaintiff, were each and both governed solely by the Constitution and laws of the United States, and, if you find from the evidence in this case that the plaintiff was injured through the negligence of either the engineer or conductor, or both, while the plaintiff and said engineer and conductor were engaged in handling or moving said freight train so engaged in commerce between the states, or if you should find that the plaintiff, by his own failure to exercise reasonable and ordinary care, proximately contributed to cause the injury complained of, then, or in either of such events, the defendant company could not be held liable in damages, and your verdict must be for the defendant."

Which was refused.

To which ruling of the court the defendant at the time duly excepted.

And the court also, over the objection and subject to the exception of the defendant, gave to the jury the following instruction:

> "If he were guilty of contributory negligence, then you are to make a comparison of the negligence of the engineer and the negligence of the plaintiff, and determine whether or not the negligence of the engineer was gross, as compared with the negligence of the plaintiff. And then, from the amount of damages, you are to deduct or diminish them in proportion as you estimate or find the amount of negligence attributable to plaintiff."

The plaintiff in error, by its assignments of error, contends that said Sec. 2 of Ch. 48, Laws of Nebraska 1907, is unconstitutional and void, in this: that, by its operation and effect, it denied to the defendant, in the trial of this case, the equal protection of the law, and that the court below erred in holding that said law applied to the subject-matter of the controversy herein. By that law, as established in Nebraska, the doctrine of comparative negligence is applied to railway companies alone, and takes away contributory negligence as a defense—which defense is available to all other persons and corporations in the state of Nebraska.

In the case of *Omaha Horse Ry. Co.* v. *Doolittle*, 7 Neb. 481, it was said:

> "Where the carelessness of the plaintiff, as well as that of the defendant, operates *directly* to produce the injury complained of, the plaintiff is not entitled to recover."

In the case of *Village of Culbertson* v. *Holliday*, 50 Neb. 229, it was held that:

> "The doctrine of comparative negligence is not in force in this state. Our courts recognize no degrees of negligence. The rule is that if a person himself, in the exercise of ordinary care, is injured through the negligence of another, he may recover; but if his own negligence contributed to or was the proximate cause of the injury, he cannot recover."
>
> *Knapp* v. *Jones*, 50 Neb. 490.

The case of *Guthrie* v. *R. R. Co.*, 51 Neb. 746, was an action brought for injury to a party crossing the railroad track. The court held that:

> "Where it is clearly established that there has been contributory negligence on the part of an injured party, which was the proximate cause of the injury, there can be no recovery therefor."

In the case of *City of Friend* v. *Burleigh*, 53 Neb. 674, the court held:

> "The doctrine of comparative negligence is not in force in this state."

The case of *Brady* v. *R. R. Co.*, 59 Neb. 233, was an action brought to recover damages for causing death at a street crossing by the railroad company. The court held:

> "Where contributory negligence was the proximate cause of personal injury, there can be no recovery for damages."

The foregoing decisions are referred to for the purpose of showing how uniformly the Supreme Court of Nebraska has adhered to the doctrine that comparative negligence does not obtain in that state, and that contributory negligence is a defense. These decisions and this rule applied to all persons and corporations in that state, and continued so to apply until the legislature of Nebraska, by Sec. 2, Ch. 48, Laws of 1907, provided a different rule in all actions brought against any railway company to recover damages for personal injuries to an employe, etc., and provided that the fact that the employe may have been guilty of contributory negligence should not bar a recovery, when his contributory negligence was slight, and that of the employer was gross in comparison.

We are not unmindful of the decisions of this Court in the case of *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205, and kindred cases, but insist that those cases have no application to the question here presented. It is true, as there decided, that the legislature may, in the exercise of its police power, give to an employe of a railway company a cause of action for an injury which he would not have had at common law. This, as we understand, is based upon the theory that the service in which he is engaged is extraordinarily dangerous and hazardous.

In the case of *Mackey* v. *R. R. Co.*, 127 U. S. 210, the court gave, as a reason for the decision, that:

> "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection

> of their employes, as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities."

It would seem that the principle announced by this Court in *Gulf, Cal. & Santa Fe* v. *Ellis*, 165 U. S. 152, 166, ought to be decisive in favor of our contention here. Among other things, it was said by the Court that:

> "It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States."
>
> * * * *
>
> "The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

Classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

In *Vanzant* v. *Waddel*, 2 Yerger 260, 270, Catron, J. (afterwards Mr. Justice Catron, of this Court), speaking for the Supreme Court of Tennessee, declared:

> "Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

In *Dibrell* v. *Morris' Heirs*, Supreme Court of Tennessee, 15 S. W. Rep. 87, 95, Baxter, Special Judge, reviewing at some length cases of classification, closes the review with these words:

> "We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this state, the basis of such classification must be natural and not arbitrary."

Section 1 of the act of the legislature of Nebraska (Ch. 48, Laws 1907), in the exercise of the police power of the state, creates the obligation on the part of the railway, and gives to the injured employe a cause of action which he did not have at common law. The first section is for the protection of the employe engaged in the hazardous and dangerous business of railroading. The second section is for the punishment of the railroad company for not promptly discharging the obligation created by the first section.

As said in *R. R. Co.* v. *Ellis*, 165 U. S. 158, *supra:*

> *"A mere statute to compel the payment of indebtedness does not come within the scope of police regulation."*

(See specially *R. R. Co.* v. *Ellis*, 165 U. S. 158-166, *supra*, and the authorities there cited.)

The only reason for the classification provided by Section 2 of the act is that the corporation made liable by Section 1 of the act is a railway company. The classification is arbitrary and unreasonable. If Section 2 of the act is valid, then the legislature would be justified in depriving the railway company of the right of appeal to a higher court from a judgment based on Section 1 of the act. Might not the legislature—in the absence of inhibitions in state constitution—under the guise of exercising the power of police regulation, deprive the railway company of the right of trial by jury in an action to enforce a liability under Section 1 of the act, at the same time preserving that right to all other parties litigant, and not thereby deny to the railway company the equal protection of the laws?

Of course Congress has the power to take away the defense of contributory negligence, and establish the doctrine of comparative negligence, because it would not thereby infringe upon any provision of the Federal Constitution. The railway company (a person) has certain rights guaranteed and vouchsafed to it by the Federal Constitution—among which is the equal protection of the laws—which no state has the constitutional power to deny.

The Federal Constitution is the supreme law of the land, and state statutes even when avowedly enacted in the exercise of the police power must yield to that law.

Central of Ga. Ry. Co. v. *Murphy*, 196 U. S. 194-206.
Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540-558.
Ritchie v. *People*, 155 Ill. 98-110.
People v. *Gillson*, 109 N. Y. 389-398.
Colon v. *Lisk*, 153 N. Y. 188-197.
Fisher & Co. v. *Wood*, 187 N. Y. 90-94.

"But this power, however broad and extensive, is not above the Constitution, which is the supreme law; and so far as it imposes restraints, the police power must be exercised in subordination to it."
State v. *Goodwill*, 33 W. Va. 179 (29 Am. St. Rep. 863-868).
People v. *Gillson*, 109 N. Y. 389-400.

If the statute, although enacted under the police power, in its operation amounts to a denial to persons within the state of the equal protection of the laws, it must be held to be unconstitutional.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540-558-559.
Gibbons v. *Ogden*, 9 Wheat. 1, 210.
Sinnott v. *Commrs. of Mobile*, 22 How. 227-242.
M. K. & T. v. *Haber*, 169 U. S. 613-626.

An unwarranted and arbitrary interference with the property rights of the citizen renders the Act unconstitutional and void.

Dobbins v. *Los Angeles*, 195 U. S. 223, 236-239.
Lawton v. *Steele*, 152 U. S. 133-137.
Jew Ho v. *Williamson*, 103 Fed. 10-19.
Ex Parte Whitwell, 98 Cal. 73, 32 Pac. 870-874.
Crescent Liquor Co. v. *Platt*, 148 Fed. 894-898.
Hume v. *Laurel Hill Cemetery*, 142 Fed. 552-563.
Colon v. *Lisk*, 153 N. Y. 188-196.

"The police power is subject to the inhibition of the Fourteenth Amendment to the Constitution of the United States against any state to deprive any person of life, liberty or property without due process of law, and to deny to any person within its jurisdiction the equal protection of the laws, and to the implied limitation that every exercise of the power must be reasonable."

State v. *Marble*, 72 Ohio, 21-33.
Dobbins v. *Los Angeles*, 195 U. S. 223.
Frorer v. *The People*, 141 Ill. 171.

No right or privilege granted or secured by the Constitution of the United States can be withdrawn or impaired by the statute of any state, even though enacted in the exercise of the police power.

Crescent Liquor Co. v. *Platt*, 148 Fed. 894-898.
Dobbins v. *Los Angeles*, 195 U. S. 223-234.
Fisher & Co. v. *Woods*, 187 N. Y. 90-94.

To justify the interposition by the state of the police power, it must appear that the interest of the *public generally,* as distinguished from a class, requires such legislation.

> *Lawton* v. *Steele,* 152 U. S. 133-137.
> *Hume* v. *Laurel Hill Cemetery,* 142 Fed. 552-565.
> *Colon* v. *Lisk,* 153 N. Y. 188-196.
> *State* v. *Redmon,* 134 Wis. 89.
> *Fisher & Co.* v. *Woods,* 187 N. Y. 90-94.

Again, the attention of the Court is called especially to the wording of Section 1, Ch. 48, Laws of 1907, page 6, which reads as follows:

> "That every *railway company* operating a railway engine, car or train in the state of Nebraska shall be liable to any of its employes who, at the time of injury, was engaged in construction or repair work, or in the use and operation of any engine, car or train for said company, etc."

Under this classification, would a receiver of a railway company be liable in the same manner as the railway company is made liable? There is nothing in the law of Nebraska which prevents an individual from engaging in construction or repair work, or in the use and operation of any engine, car or train, but under this law such individual would not be liable to his employe engaged in construction or repair work, or in the use and operation of an engine, car or train for such individual.

To illustrate: the Stock Yards Company of Omaha operates engines, cars and trains. Is such com-

pany liable, under the provisions of this statute? Many mill companies and local industries at Omaha own their own cars, engines and tracks, in connection with the prosecution of their industrial business. Would an employe of such mill company or industry have a cause of action against it, based upon the same facts which give a cause of action, under this statute, against a railway company, as such?

Contractors, in the construction of railway lines, frequently own their own engines and cars, and use the same in the prosecution of their work; yet they are not "railway companies" within the meaning of Ch. 48, Laws of Nebraska 1907.

The attention of the Court is also called to the fact that, under Section 2 of the Act, it is provided that: "All questions of negligence and contributory negligence shall be for the jury." Does this mean to take away from the railway company the right to have the findings or verdict of a jury on this question reviewed by the trial court or an appellate court? If it does, then the railway company is, without any reason, denied the equal protection of the law. What public benefit is subserved by selecting a railway company, as such, and providing, in the exercise of the police power of the state, that, in the trial of actions under this Act, such railway companies shall be deprived of the right to have the court review the verdict of the jury "as to questions of negligence and contributory negligence"? Is not the classification attempted by this Act wholly unreasonable, and therefore by reason thereof the statute absolutely unconstitutional and void?

We respectfully submit that the motion of the defendant in error to affirm the judgment of the court below should be denied, and that the Court should, upon the abstract of the record presented, and for the reasons hereinbefore set forth, reverse the judgment of the court below and award to the plaintiff in error a new trial.

BALIE P. WAGGENER,
Attorney for Plaintiff in Error.

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NUMBER 344.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

VS.

OZRO CASTLE, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA. OMAHA DIVISION.

MOTION TO AFFIRM AND BRIEF OF DEFENDANT IN ERROR IN SUPPORT THEREOF.

T. J. MAHONEY,
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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA. OMAHA DIVISION.

MOTION TO AFFIRM UNDER SUBDIVISION 5 OF RULE 6.

Comes now Ozro Castle, defendant in error in the above entitled cause, and presents this his motion under subdivision 5 of rule 6 of this court, to affirm the judgment in said cause on the ground that it is manifest that the writ of error herein was taken for delay only and that the questions on which the decision of the cause

depend are so frivolous as not to need further argument.

This defendant in error shows to the court that this proceeding is brought here by writ of error directly from the Circuit Court for the District of Nebraska; that in the said Circuit Court this was an ordinary civil action at law for the recovery of money only, and the writ of error presents to this court only the following questions:

1. The construction or application of the Constitution of the United States.

2. The validity of a law of the State of Nebraska claimed to be in contravention of the Constitution of the United States.

The only question that can be presented by this record is whether the Constitution of the United States is contravened by Sections 3 and 4 of Chapter 21 of the Compiled Statutes of Nebraska, being Sections 1 and 2 of an Act of the legislature of the State of Nebraska of 1907, which makes every railway company operating in the State of Nebraska liable to its employees who, at the time of injury, are engaged in construction or repair works or in the use and operation of any engine, car or train for said Company, for all damages which may result from the negligence of its officers, agents or employees, and which further provides that in such case contributory negligence shall not be a bar to recovery where the negligence of the injured employe was slight and that of the employer was gross in com-

parison, but that damages shall be diminished in proportion to the amount of negligence attributable to the injured employe.

The foregoing question has been so definitely determined by this court in favor of the validity of the above mentioned statute as to render the contention of the plaintiff in error so frivolous as not to need further argument.

Wherefore, defendant in error respectfully moves the court to peremptorily affirm the judgment in said cause.

T. J. MAHONEY,
J. A. C. KENNEDY,
Attorneys for Defendant in Error.

NUMBER 344.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

VS.

OZRO CASTLE, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO AFFIRM.

STATEMENT OF THE CASE.

In 1907 the legislature of Nebraska passed an act consisting of the following two sections:

> "Section 1. That every railway company operating a railway engine, car or train in the State of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work, or in the use and operation of any engine, car or train for said company, or in the case of his death to his personal representatives for the benefit of his widow and children, if any,

if none, then to his parents, if none, then to his next of kin dependent upon him, for all damages which may result from negligence of any of its officers, agents, or employees, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or work."

"Section 2. That in all actions heretofore brought against any railway company to recover damages for personal injuries to an employe, or when such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight and that of the employer was gross in comparison, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe, all questions of negligence and contributory negligence shall be for the jury."

The plaintiff in error is a railway corporation which, before the passage of the above act, and ever since was and has been engaged in operating a railway with engines, cars, trains, etc. within and through portions of the State of Nebraska, said plaintiffs in error, however, being incorporated under the laws of the State of Missouri. The defendant in error at the time of receiving the injuries of which he complained, and thenceforward, was and is a resident and citizen of the State of Nebraska, and at the time of receiving said injuries was in the employ of the plaintiff in error as a brakeman upon one of its freight trains operating in the State of Nebraska. The injury complained of occurred on the second day of October, 1907, some few months after the above mentioned legislation of the State of Nebraska had gone

into effect. At the time of receiving the injury the defendant in error was one of a crew operating a certain freight train of the plaintiff in error, which had started from St. Joseph, in the State of Missouri, passing thence through a portion of the State of Kansas, and thence into the State of Nebraska bound for Omaha, and had reached the station of Auburn, in the State of Nebraska. While the crew was doing some switching at Auburn defendant in error was run over by a portion of the train through the negligence of the engineer in charge of the train, and this action was brought to recover on account of said injury.

The defendant by its answer (printed record, pages 4 to 5), charges that the above act of the State of Nebraska is in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it denies the equal protection of the law; that it is in contravention of Section eight of Article one of the Constitution of the United States conferring upon Congress power to regulate commerce among the States. At the trial of the case plaintiff in error requested the court to peremptorily request the jury to return a verdict in its favor on the ground that the sole negligence shown was the negligence of a fellow servant. This request the court refused and the plaintiff in error reserved an exception (Printed record, page nine).

Plaintiff in error requested the trial court to charge the jury that if the injury sustained by plaintiff (defend-

ant in error) was caused by the negligence of a fellow servant, the engineer or the conductor, of a train engaged in interstate commerce, there could be no recovery. These requests were denied and plaintiff in error reserved exceptions (printed record, pages 10 and 11).

The Circuit Court charged the jury in accordance with the second section of the Nebraska Act, that, if the negligence of the plaintiff (defendant in error) contributed to cause the injury, such contributory negligence would not be in itself a bar to a recovery provided his contributory negligence was slight in comparison with the gross negligence of the defendant (plaintiff in error). To this charge plaintiff in error reserved an exception (printed record, pages 19 and 20).

ASSIGNMENT OF ERRORS.

Some of the assignments of error contained in the present record undertake to raise questions which cannot be presented to this court. The assignments which this court can consider are those numbered respectively I, II, V, VI, and VIII appearing in the printed record at pages 21 to 24, as follows:

I.

The court erred in refusing to give the jury instruction No. 4, requested by the defendant, as follows:

> "The jury are instructed that it appears from the allegations of the petition and by the undisputed evidence in this case, that at the time the plaintiff sustained the injuries complained of he was in the service and the employ of the defendant company, an interstate carrier, upon a freight train of said defendant, which said train was at the time engaged in trade and commerce between the States of Missouri, Kansas and Nebraska. And the defendant railroad company, being such interstate carrier, and the plaintiff, while so engaged, were each and both, so far as any liability on the part of the defendant, or right to recover for injuries sustained on the part of the plaintiff, were each and both, governed solely by the constitution and the laws of the United States and if you find from the evidence in this case that the plaintiff was injured through the negligence of either the engineer or conductor or both, while

the plaintiff and said engineer and conductor were engaged in handling or moving said freight train so engaged in commerce between the states, or if you should find that the plaintiff, by his own failure to exercise reasonable and ordinary care, proximately contributed to cause the injury complained of then or in either of such events, the defendant company could not be held liable in damages and your verdict must be for the defendant."

To which ruling of the court the defendant at the time duly excepted.

II.

The court erred in refusing to give to the jury Instruction No. 3 requested by the defendant, as follows:

"The jury are instructed that under the law the conductor, the engineer and the brakeman of a freight train, while engaged in moving and operating such train are what is known in the law as fellow servants and if either or any of such persons is injured while so engaged through the fault, neglect, carelessness or negligence of any one or the other of such persons, then the employer, in this case the defendant railroad company—could not be held liable for any damage which such person might sustain on account of such injuries. The law is that the master or employer cannot be held liable for any injury sustained resulting from the negligence of a co-employee or fellow servant, and you are thereon instructed that if you find from the evidence that the plaintiff was injured through the fault, neglect, omission or negligence of the engineer or

the conductor in charge of and moving train No. 163 or a portion thereof, then the plaintiff would be held to have sustained such injuries through the negligence of a fellow servant for which the defendant company could not be held liable and your verdict must be for the defendant."

To which ruling of the court the defendant at the time duly excepted.

V.

The court erred in instructing the jury as follows:

"If he were guilty of contributory negligence then you are to make a comparison of the negligence of the engineer and the negligence of the plaintiff and determine whether or not the negligence of the engineer was gross as compared with the negligence of the plaintiff. And then from the amount of damages you are to deduct or diminish them in proportion as you estimate or find the amount of negligence attributable to plaintiff."

To which the defendant at the time duly excepted as follows:

"Also, and in the presence of the jury and court, the defendant excepts to that part of the instructions of the court in which the court instructs the jury that if the plaintiff was guilty of negligence contributing to, or causing his injury, that would not bar a recovery if the negligence of the plaintiff was slight in comparison with the gross negligence of the defendant, there being no allegation of gross negligence in the petition, and no showing of that kind."

VI.

The court erred in instructing the jury as follows:

"Then with regard to contributory negligence, the statute is as follows: 'That in all cases hereafter brought against any railway company to recover damages for personal injuries to any employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight, and that of the employer was gross in comparison, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.'"

To which the defendant excepted as follows:

"And further, and in the presence of the jury and court, the defendant excepts to that part of the instructions of the court which says that if the jury should find that both the plaintiff and defendant were guilty of negligence combining or contributing to the injury of the plaintiff, then the plaintiff would still be entitled to recover, but would be entitled only to a diminution of damage which was to be ascertained by the jury in comparing the one with the other."

VIII.

The court erred in instructing the jury as follows:

"If he were guilty of contributory negligence then you are to make a comparison of the negligence of the engineer and the negligence of the plaintiff and determine whether or not the negligence of the engineer was gross as compared with the negligence of the plaintiff."

To which the defendant excepted as follows:

"And further, and in the presence of the jury and court the defendant excepts to that part of the instructions of the court which states to the jury the measure of damage, in that it allows to the jury the right to compare the negligence of the plaintiff with the defendant and establishes a measure of damages unauthorized by law, and not applicable generally to actions at law."

Questions Presented.

The only questions that can be presented upon the record now before the court are:

1. *Does the above mentioned statute of Nebraska contravene the fourteenth amendment to the Constitution of the United States by depriving persons within the jurisdiction of the State of Nebraska of the equal protection of the law, in that said act is applicable, as between master and servant, to railway service only, and does not apply as between other employers and employees?*

2. *Is the foregoing statute of Nebraska in contravention of the commerce clause of the Federal Constitution?*

THE ARGUMENT.

I. The first section of the Nebraska Act.

That the first section of the above mentioned Nebraska statute is not in violation of the Federal Constitution, in that it makes a railway company liable to one employe engaged in train service for an injury inflicted through the negligence of another employe in the same service, has been so frequently and definitely declared by this court as to put it beyond the realm of argument.

Missouri Pacific Railway Company v. *Mackey*, 127 U. S. 205.

Minneapolis & St. L. Ry. Co. v. *Herrick*, 127 U. S. 210.

Tullis v. *Railway Company*, 175 U. S. 348.

Chicago, K. & W. R. Co. v. *Pontius*, 157 U. S. 209.

Mondou v. *N. Y. and N. Y. & Hartford Railway Co.*, No. 120 October Term, 1911, decided January 15, 1912.

II. The second section of the Nebraska Act.

That the second section of the act modifying the rules of contributory negligence in railway service, without making a similar modification as between master and servant in other occupations, is not in violation of the fourteenth amendment to the Constitution of the United States is established in principle in each of the decisions cited in the last preceding paragraph; for it must be manifest that the same reasons which justify a departure from the common law rule in respect to the negligence of a fellow servant will likewise justify a similar departure in regard to the effect of contributory negligence in the

same class of hazardous occupation, as the classification is identical in both instances.

In *Mondou* v. *N. Y., N. H. and H. R. Company, supra,* this court stated that one of the changes made by the Federal employers liability act under the consideration in that case, was: "The rule exonerating an employer from liability for injuries sustained by an employe through the concurring negligence of the employer and the employe is abrogated in all instances where the employer's violation of the statutes enacted for the safety of his employes contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the employe."

This last modification, bringing in the rule of comparative negligence, is the same under the Nebraska statute here under consideration as under the Federal statute passed on by this court in the case just cited. Relative to this, as well as the other changes made by the Federal Act, this court said that the natural tendency of such changes is to induce greater care and thereby advance commerce. It further held that the classification, which applied these rules to railway companies and not to all other employers, is a reasonable and proper classification, such as the states have been permitted to make without violating the fourteenth amendment to the Constitution.

This court further held in *Mondou* v. *New York, N. H. and H. R. Company, supra,* that a person

has no property or vested right in any rule of the common law, and that the law itself, as a rule of conduct, may be changed at the will of the legislature unless prevented by constitutional limitations.

Under these holdings there is no longer any room to argue that it was not competent for the legislature of Nebraska to modify the contributory negligence rule, and to abrogate the common law rule exonerating the master from liability for an injury to one servant through the negligence of another. Neither is it open to any longer contend that a statute of this kind, applicable only to the hazardous business of railroad operation, violates any provision of the Constitution of the United States.

III. The Nebraska Act does not violate the provision of the United States Constitution vesting Congress with the power to regulate commerce between the states.

This Nebraska statute was enacted prior to the enactment of the present Federal law governing the same subject, and the accident in question in this case occurred after the enactment of the Nebraska statute, but before the enactment of the federal statute on this subject. In other words, at the time defendant in error received the injury in question there was no federal legislation affecting the liability of the railroad company to its employes under the conditions shown in this case. There was, however, the Nebraska statute which is now drawn in question. That, in the absence of federal legislation upon the subject, the enactment of such laws as this falls within the police power of the state has been repeatedly settled

by this court. The rule is reiterated in *Mondou* v. *New York, N. Y. & H. R. Company, supra*, as follows:

> "True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress."
>
> *Sherlock* v. *Alling*, 93 U. S. 99.
> *Smith* v. *Alabama*, 124 U. S. 465, 473, 480, 482.
> *Nashville, etc., Ry. Co.* v. *Alabama*, 128 U. S. 96, 99.
> *Reid* v. *Colorado*, 187 U. S. 137, 146.

To the same effect is *Chicago, M. & St. P. R. Co.* v. *Solan*, 169 U. S. 133.

Conclusion.

From the foregoing it is apparent, that every possible question that can be raised in this case has been so distinctly and definitely settled by the decisions of this court that it is no longer open to any party to contend that the Nebraska statute in question is not a valid and effective piece of legislation governing the liability of the plaintiff in error in this case, even though that statute may be superseded by Federal legislation enacted since the present cause of action arose. For this reason, it is respectfully submitted that the judgment herein ought to be affirmed without further argument.

T. J. MAHONEY,
J. A. C. KENNEDY,
Attorneys for Defendant in Error.

THE MISSOURI PACIFIC RAILWAY COMPANY v. CASTLE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 344. Submitted April 22, 1912.—Decided May 13, 1912.

This court has repeatedly held that a State may impose upon a railway company liability to an employé engaged in train service for an injury inflicted through the negligence of another employé in the same service.

A State also has power to modify or abolish the common-law rule of contributory negligence, and provide by statute that damages to an employé of a railroad company shall only be diminished by reason of his contributory negligence in proportion to the amount of negligence attributable to him.

Prior to the enactment by Congress of the Employers' Liability Act, the States were not debarred from legislating for the protection of railway employés engaged in interstate commerce.

The fact that a state statute imposing liability on railway companies for injuries to employés covers acts of negligence in respect to subjects dealt with by the Federal Safety Appliance Act does not amount to an interference with interstate commerce.

The railway liability act of Nebraska of 1907 is not unconstitutional as depriving a railway company of its property without due process of law, or denying it equal protection of the law, or as interfering with interstate commerce.

A corporation of one State, which only becomes a corporation of another by compulsion of the latter so as to do business therein, is not a corporation thereof, but remains, so far as jurisdiction of Federal courts is concerned, a citizen of the State in which it was originally incorporated. *Southern Railway Co.* v. *Allison*, 190 U. S. 326.

THE facts, which involve the constitutionality of the statute of Nebraska of 1907 imposing liability on railway corporations for injury to employés, are stated in the opinion.

Mr. B. P. Waggener, with whom *Mr. F. A. Brogan* and *Mr. Edgar M. Morseman, Jr.*, were on the brief, for plaintiff in error.

Mr. T. J. Mahoney, with whom *Mr. J. A. C. Kennedy* was on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Alleging himself to be a citizen of Nebraska and averring that the Railway Company was a citizen of Missouri, Castle sued the Railway Company to recover for injuries received by him while in the service of the Railway Company as a brakeman upon a freight train operating in the State of Nebraska, the injury having been occasioned through the negligence of a co-employé. The right to recover under such circumstances was based upon a Nebraska statute adopted in 1907 consisting of two sections which are now §§ 3 and 4 of chapter 21 of the Compiled Statutes of Nebraska. The first section made every railway company liable to its employés who, at the time of the injury,

were engaged in construction or repair works or in the use and operation of any engine, car or train for said company, for all damages which may result from the negligence of its officers, agents or employés, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or work. The second section provided that contributory negligence shall not be a bar to recovery where the negligence of the injured employé was slight and that of the employer was gross in comparison, but that damages shall be diminished in proportion to the amount of negligence attributable to the injured employé. In its answer the Railway Company admitted that it was then and was at all of the times mentioned in the petition "a railroad corporation organized and existing under and by virtue of the laws of the State of Missouri," and set up that the injury to the plaintiff was caused by the negligence of a fellow-servant or co-employé, and was also the result of the contributory negligence of the plaintiff. The validity of the second section of the statute was challenged because it deprived "of the defence of contributory negligence accorded to all other litigants, persons or corporations within the State of Nebraska," and because the statute established and enforced against railroads a rule of damages not applicable to any other litigant in similar cases, whereby the privileges and immunities of the company as a citizen of the United States within the jurisdiction of the State of Nebraska were abridged and it was denied the equal protection of the laws in violation of the Fourteenth Amendment. The repugnancy of the statute to the commerce clause of the Constitution was also averred, on the ground that "the plaintiff at the time he received the injuries complained of was engaged as an employé of an interstate railroad engaged in commerce between the States of Missouri. Kansas and Nebraska," and the statute of Nebraska "attempts to regulate and

control as well as create a cause of action and remedy, imposing upon the defendant company a liability inconsistent with and repugnant to the action of the Congress of the United States on said subject."

At the trial the company excepted to the refusal of the court to give instructions embodying its contentions respecting the invalidity of the statute, and also excepted to the giving of certain instructions which were antagonistic to those contentions. From a judgment entered upon a verdict of a jury in favor of the plaintiff this direct writ of error was sued out.

Defendant in error moves to affirm the judgment under subdivision 5 of Rule 6. The motion we think should prevail, since the questions urged upon our attention as a basis for a reversal of the judgment have been so plainly foreclosed by decisions of this court as to make further argument unnecessary.

This court has repeatedly upheld the power of a State to impose upon a railway company liability to an employé engaged in train service for an injury inflicted through the negligence of another employé in the same service. *Missouri Pacific Railway Company* v. *Mackey*, 127 U. S. 205; *Minneapolis & St. L. Ry. Co.* v. *Herrick*, 127 U. S. 210; *Tullis* v. *Lake Erie & W. Railway Company*, 175 U. S. 348; *Chicago, K. & W. R. Co.* v. *Pontius*, 157 U. S. 209; and *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1.

Obviously, the same reasons which justified a departure from the common-law rule in respect to the negligence of a fellow-servant also justify a similar departure in regard to the effect of contributory negligence, and the cases above cited in principle are therefore authoritative as to the lawfulness of the modification made by the second section of the statute under consideration of the rule of contributory negligence as applied to railway employés. The decision in the *Mondou Case* sustaining the validity of the Federal Employers' Liability Act practically

forecloses all question as to the authority possessed by the State of Nebraska by virtue of its police power to enact the statute in question and to confine the benefits of such legislation to the employés of railroad companies; and as, at the time the plaintiff received the injuries complained of, there was no subsisting legislation by Congress affecting the liability of railway companies to their employés, under the conditions shown in this case, the State was not debarred from thus legislating for the protection of railway employés engaged in interstate commerce. See the *Mondou Case, supra*, and *Chicago, M. & St. P. R. R. Co.* v. *Solan*, 169 U. S. 133.

The circumstance that the Nebraska statute covers acts of negligence of railroad companies in respect to their cars, roadbed, machinery, etc., subjects dealt with by the Safety Appliance Act of March 2, 1893, 27 Stat. 531, c. 196, does not afford any substantial ground for the contention that the statute is involved in so far as it imposed liability for an injury to an employé arising from the negligence of a co-employé.

In the argument at bar, a contention is made, which was seemingly not presented in the court below nor alluded to in the assignments of errors, viz., that although originally incorporated under the laws of the State of Missouri, the Railway Company had, in law and in fact, become a domestic corporation in Nebraska under the constitution and laws of that State, and was such domestic corporation when this suit was instituted, and in consequence the diversity of citizenship essential to the jurisdiction of the Circuit Court was wanting. In support of the contention an allegation of the petition is quoted to the effect that the railway company owned and operated its road as well in the State of Nebraska as in the other States, and reference is made to a provision of the constitution of Nebraska—§ 8, art. XI, Comp. Stat. Neb. 1905, pp. 74–75—denying to a railroad corporation or-

ganized under the laws of any other State or of the United States and doing business in Nebraska the power to exercise the right of eminent domain or to acquire the right of way or real estate for depot or other uses until it shall have become a body corporate pursuant to and in accordance with the law of the State. Two decisions of the Supreme Court of Nebraska are cited, in one of which (*State ex rel. Leese* v. *Mo. Pac. Ry. Co.*, 25 Nebraska, 164–165), it is said it was decided that "because of consolidations with domestic companies," the Missouri Pacific Company had become a domestic corporation in the State of Nebraska, and could therefore "acquire a right of way," etc. As to the other (*Trester* v. *Mo. Pac. Ry. Co.*, 23 Nebraska, 242–249), the contention appears to be that the railway company was held to be a domestic corporation by force of the constitutional provision heretofore referred to. In the face, however, of the clear admission made in the answer of the railway company as to the existence of diverse citizenship, we cannot assent to the soundness of the claim now made, based on the contentions referred to. Certainly, in the absence of any issue on the subject, weight cannot be attached to the decision in 25 Nebraska; and it is consistent with the constitutional provision to infer that the railway company, if it became a domestic corporation of Nebraska, did so by compulsion of the Nebraska statutes on the subject. Indeed the contention is adversely disposed of by *Southern Ry. Co.* v. *Allison*, 190 U. S. 326, cited in *Patch* v. *Wabash R. Co.*, 207 U. S. 277, 284. In the *Allison Case*, the court, among other cases, referred approvingly to *Walters* v. *Chicago, B. & Q. R. R. Co.*, 104 Fed. Rep. 377, where it was held that a corporation originally created by the State of Illinois although made by the law of Nebraska a domestic corporation of that State, was nevertheless a citizen of Illinois.

Judgment affirmed.